284 - 28942

CHICAGO AND WESTERN INDIANA RAILROAD COMPANY,
Cross-Complainant Below and Appellant,

vs.

JOHN C. FETZER, BENJAMIN THOMAS and CHARLES R. KAPPES,
Cross-Defendants Below and Appellees.

240 I.A. 635

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Chicago & Western Indiana Railroad, cross-complainant, from a decree of the Superior court of Cook county in a suit in equity for an accounting brought by a cross-bill by the Chicago & Western Indiana Railroad Company against John C. Fetzer, Benjamin Thomas and Charles R. Kappes, defendants.

Fetzer is the only defendant that is a party to this appeal.

The cross-complainant claims that there is a balance due from Fetzer amounting to $652,391. Fetzer denies that any amount is due. The chancellor decreed that the cross-complainant should recover $25,000 with interest, making a total of $28,854.17; and that Fetzer should recover $5,038.16 for costs advanced by him.

The present cross bill of the Chicago and Eastern Indiana Railroad Company was filed in a suit in equity brought by Fetzer to set aside and to enjoin the enforcement of an award that was made in an arbitration proceeding between the Chicago and Western Indiana Railroad Company on the one side, and Fetzer, Thomas and Kappes on the other. The arbitration proceeding grew out of a suit in equity brought by the Chicago and Western Indiana

Railroad Company against Fetzer, Thomas and Kappes, alleging fraudulent misappropriation of the funds of the Chicago and Western Indiana Railroad Company by Fetzer, Thomas and Kappes, and asking for an accounting. The finding of the award in the arbitration proceeding was that Fetzer, Thomas and Kappes should account for and pay XXX to the Chicago and Western Indiana Railroad Company the sum of $525,000.

In Fetzer's bill to set aside the award it is alleged, among other things, that the Chicago and Western Indiana Railroad Company is a corporation of Illinois with a capital stock of $6,000,000, at all times held and owned in equal shares by the Grand Trunk Western Railway Company, the Chicago and Eastern Illinois Railroad Company, the Chicago, Indianapolis and Louisville Railroad Company, the Chicago and Erie Railroad Company, and the Wabash Railway Company; that these companies are referred to as holding companies; that the properties of the Chicago and Western Indiana Railroad Company (except a belt line division and elevator) are leased on a wheelage basis under perpetual contracts conjointly to the holding companies, the Atchison, Topeka and Santa Fe Railway and the Elgin, Joilet and Eastern Railroad Company.

That the Chicago and Western Indiana Railroad Company has six directors, appointed by the five holding companies, and the Atchison, Topeka and Santa Fe Railway Company, a tenant, each holding company appointing one director and the Atchison, Topeka and Santa Fe Railway Company also appointing one; that each director so appointed is an officer or director of the company appointing him.

That Fetzer is and for many years has been engaged in the purchase and sale of railroad terminal properties and rights of way in and about Chicago, and for many years last past has purchased, sold and dealt in a much larger amount of such property than any other person in the city of Chicago.

That Fetzer entered into an agreement with the Chicago and Western Indiana Railroad Company, acting by Thomas, its president, that Fetzer should "acquire by purchase certain properties in and about Chicago along or pertinent to the right of way" of the Chicago and Western Indiana Railroad Company, to be designated from time to time by Thomas; that Fetzer should "in turn deliver or report said properties to said Railroad Company at a price which should be acceptable to it, and if not so acceptable, there would be no obligation to purchase;" that the purchase price to be paid by the Railroad Company for the properties should "include a profit" to Fetzer "in lieu of all compensation or commission;" that Fetzer "should perfect all titles to said property;" that in the acquisition of the properties and under the agreement, Fetzer "was not and never became the agent or employee in any way of" the Railroad Company; that neither the Railroad Company nor anyone acting on its behalf or otherwise, was to or ever did pay Fetzer any commission or compensation of any kind, and that he received none for making the purchases, "other than the profit aforesaid."

That for more than eighteen years Thomas had been president of the Chicago and Western Indiana Railroad Company, and as such had full power to make the agreement, and that prior to making it Fetzer had been informed by one or more of the directors of the Chicago and Western Indiana Railroad Company that Thomas would make such agreement and had full power so to do.

That at that time Kappes was an employee of the Chicago and Western Indiana Railroad Company under the immediate supervision of Thomas; that Kappes' duties were to examine titles of properties purchased, sold or held by the Railroad Company, to rent such properties, and to collect the "rents and muniments of title;" that "it was not within the duties of" Kappes "as such employee, or within the scope of his employment to acquire or

purchase property" for the Railroad Company.

That Frederic A. Delano was then President of the Wabash Railway Company and its representative as director of the Chicago and Western Indiana Railroad Company; that Delano introduced Fetzer to Thomas "as a capable and trustworthy person to make said purchases of real estate for said defendant Railroad Co. (your orator having theretofore been making similar purchases for said Wabash Railroad);" that following the introduction Fetzer made the above agreement; that he is informed that the agreement was made pursuant to a resolution of the board of directors of the Chicago and Western Indiana Railroad Company directing Thomas "to make such purchase of said property 'through the same agency' referring" to Fetzer, who had made purchases for the Wabash Railway Company, but the purchases for the Chicago and Western Indiana Railroad Company were to be made under a different arrangement than the one between Fetzer and the Wabash Railway Company.

That the purchase of railroad property "is a big line of work and is and for many years has been conducted differently from the purchase of other kinds of property;" that usually such purchases are made in the name of persons unknown to the vendors, and that "title is taken in the names of nominees having no interest, but acting only as a channel of title;" that such property is more difficult to obtain on reasonable terms because owners think a railroad company must have the properties, and will pay more than individuals would; that one dealing in such properties "is entitled to and received a larger remuneration and profit by reason of the care and skill required to make such purchases."

That before Fetzer began to make any purchases, Thomas directed him to employ Kappes (on account of Kappes' special knowledge of the situation) to assist him in getting such properties; that

Thomas informed Fetzer that Kappes could give him valuable information and assistance and that Kappes should be paid without expense to the Chicago and Western Indiana Railroad Company out of Fetzer's profits; that pursuant to such request and authorization Fetzer employed Kappes to assist in making the purchases and agreed to pay him an amount afterwards to be determined upon, dependent upon the service and what Fetzer could afford to pay out of his profits; that Kappes had theretofore assisted in making the purchases for the Wabash Railway Company and that this fact was known to the Chicago and Western Indiana Railroad Company.

That about June 1, 1916, pursuant to the agreement with the Chicago and Western Indiana Railroad Company, Fetzer began to acquire properties designated by Thomas and purchased three tracts adjoining the right of way of the Railroad Company, which tracts Fetzer afterwards caused to be deeded to the Railroad Company, the tracts being generally described as follows: Parcel A consisting of three yards or tracts adjoining the railroad at (1) Stony Island Avenue, South Chicago; (2) at Hayford Yards; and (3) at the Western Electric Yards between 22nd and 16th streets. Parcel B, a large tract of land adjoining the right of way at Canal street between 24th and 29th streets. Parcel C, composed of numerous pieces of property at Hegewisch, purchased for the Chicago and Western Indiana and the Kensington and Eastern Railroad company - all purchased during 1906 and 1907.

That the purchases of Parcels A, B and C were made by Fetzer from 150 different owners; and in making them and turning over the properties to the Chicago and Western Indiana Railroad Company, Fetzer "at all times acted in the utmost good faith, exercised the highest degree of skill and care" and borrowed sev-

eral hundred thousand dollars on his personal credit to make the purchases, and in every transaction conveyed to the Chicago and Western Indiana Railroad Company a good title.

That there was no collusion between Fetzer, Thomas, Kappes, or with any other person in fixing the prices for the properties, and that before Fetzer bought any of those properties he would inform Thomas at what price the Chicago and Western Indiana Railroad Company could acquire each piece of property from Fetzer, and that Thomas would accept or reject the proposition so made.

That Fetzer devoted great care and labor for two years in making the purchases and obtaining the titles to the properties; that the transactions were not completely closed until the spring of 1908, when "a full accounting was then and there had between" the Chicago and Western Indiana Railroad Company and Fetzer of all of the purchases; that no question was raised by the Railroad Company or any of its officers "with reference to the accounting and the correctness thereof until January 19, 1910."

That at that time the Chicago and Western Indiana Railroad Company filed a bill in equity in the Circuit court against Fetzer, Thomas, Kappes, and certain other persons, charging them with fraud in the purchase of the properties and in the conveying of them to the Railroad Company, and charging that by collusion between Fetzer, Thomas and Kappes $1,200,000 belonging to the Railroad Company had been misappropriated, all of which charges Fetzer claims are utterly untrue.

That on February 9, 1910, after the filing of the bill, Fetzer, the Chicago and Western Indiana Railroad Company, Thomas and Kappes entered into an arbitration agreement.

That in the arbitration agreement it was agreed that all

moneys and bonds received by Fetzer from the Chicago and Western Indiana Railroad Company, except $425,000, had been paid out in the purchase of property; that Fetzer had received from the Chicago and Western Indiana Railroad Company $2,764,309.25, of which $875,000 was in the bonds of the Railroad Company at par; that Fetzer made a gross profit of $151,202.12 represented by bonds of the Railroad Company, worth 80 per cent; that this profit remained after paying Kappes $61,172.88, of which $21,000 was in bonds of the Railroad Company and the balance was in cash; that out of the $425,000 Fetzer paid back to the Railroad Company "or under its order" $122,000; paid as directed by the Railroad Company $60,000; and also paid as directed by the Railroad Company $30,000 to William J. Henley, the Vice-President and General Counsel of the Railroad Company; that from these payments Fetzer in no way profited.

That Fetzer was at no time an officer, director or employee of the Chicago and Western Indiana Railroad Company, and that in receiving the moneys and bonds he dealt only with Thomas; that he received instructions from Thomas in 1907 to "turn over and pay back" to the Railroad Company sums aggregating $122,000; that he did turn over that sum to Thomas and in the same manner paid $30,000 to Henley and $60,000 to other persons; that at the time that Thomas requested Fetzer to make these payments Thomas stated to Fetzer that he, Thomas, had authority to make the payments; that all such payments were for the benefit of the Chicago and Western Indiana Railroad Company; that Fetzer did not know the purposes for which the moneys were to be used, but that he has since learned that they were for the benefit of the Railroad Company, and that certain of its officers and directors knew about the payments and requested that they be made.

That on March 18, 1910, the arbitrator delivered in

writing an award directing Fetzer to pay $523,000 to the Chicago and Western Indiana Railroad Company; that the award was "fraudulent, illegal and void."

That Fetzer tendered and offered to pay to the Chicago and Western Indiana Railroad Company "any and all sums of money that may be found by this court to be due and owing from him to said defendant Railroad Company by reason of the transactions referred to in said arbitration agreements."

The answer of the Chicago and Western Indiana Railroad Company to the bill of Fetzer denied all of the allegations in the bill as to Fetzer's having received the moneys and bonds from the Railroad Company as an independent vendor, or that he was authorized by the Chicago and Western Indiana Railroad Company to make any disbursements of the money and bonds, except in the purchase of real estate for the Chicago and Western Indiana Railroad Company; denied that Fetzer ever returned to the Chicago and Western Indiana Railroad Company the $218,000 which he claimed he had paid to Thomas, Henley, and other persons under Thomas' directions; and alleged that all the moneys and bonds were delivered to Fetzer as the agent of the Chicago and Western Indiana Railroad Company, and in no other capacity; denied that Fetzer was employed as alleged in the bill and averred that if any such arrangement was made, it was in pursuance of a fraudulent conspiracy between Fetzer, Thomas and Kappes to defraud the Chicago and Western Indiana Railroad Company; denied that purchases of property for railroad purposes are different from purchases of other property, or that brokers making purchases of property for railroad purposes are entitled to larger remuneration than brokers buying other property; denied that Fetzer ever acquired for himself title to either Parcel A, B, or C, or had ever informed the Chicago and Western Indiana

Railroad Company of the price at which the parcels or any one of them could be bought from him, or that he acted in good faith, or exercised the highest degree of skill in the purchase of the parcels, or was vendor of any one of the parcels; alleged that the Chicago and Western Indiana Railroad Company supplied Fetzer with such sums of money as he needed from time to time to make such purchases, and that all of such sums were received by him as agent of the Chicago and Western Indiana Railroad Company; denied that any accounting had been made for such sums of money, or that any part of the sum of $212,000 had been paid out by Fetzer under the direction of the Chicago and Western Indiana Railroad Company or for its benefit.

The answer of Thomas to Fetzer's bill admitted that Thomas made the arrangement with Fetzer to furnish the funds to buy properties which Fetzer would offer to the Chicago and Western Indiana Railroad Company in the manner as alleged in Fetzer's bill; admitted that the board of directors of the Chicago and Western Indiana Railroad Company passed a resolution directing Thomas to employ Fetzer to purchase the properties, but alleged that Thomas had no remembrance of the wording of the resolution and believed that the resolution was the same as the bill sets forth; alleged that Fetzer purchased the properties under the agreement and that a full accounting was had between the Chicago and Western Indiana Railroad Company and Fetzer; denied knowledge of Fetzer's profit in making the purchase, but asks for strict proof; admitted that Fetzer returned to the Chicago and Western Indiana Railroad Company, or to Thomas as directed by him for the Chicago and Western Indiana Railroad Company, a large sum of money and paid further sums to Henley when so directed, but denied knowledge as to the exact amounts; alleged that in directing Fetzer to make the disbursements, Thomas had authority to do so; alleged on information and belief that the disbursements

were for the benefit of the Chicago and Western Indiana Railroad Company.

The answer of Kappes to Fetzer's bill denied knowledge of Fetzer's agreement for the purchase of the properties; or of Thomas' authority to make such an agreement; or of Fetzer's fidelity in carrying out the agreement; denied that Kappes was paid by Fetzer as large an amount as alleged, but alleges that he had agreed with Fetzer to stand charged with that amount to expedite the hearing before the arbitrator.

The cross bill of the Chicago and Western Indiana Railroad Company recited its original bill referred to in Fetzer's bill, and recited the arbitration agreement and the award; alleged that under the award Thomas and Kappes had paid to the Chicago and Western Indiana Railroad Company $76,000 and that nothing more had been paid; that Fetzer had filed his bill to set aside the award and had offered to account to the Chicago and Western Indiana Railroad Company; that in the event the award should be set aside the court should require an accounting by Fetzer for an amount much greater than the award, which amount Fetzer in collusion with Thomas and Kappes had misappropriated; that Fetzer was employed by the Chicago and Western Indiana Railroad Company to purchase certain properties adjacent to that Company's right of way between 23rd and 29th streets in pursuance of a resolution of the Company's directors; that Fetzer accepted the said employment with the purpose and intention of defrauding the Company by falsely representing that the properties purchased cost sums far in excess of the amounts actually expended therefor.

The cross bill sets forth the amounts paid to Fetzer by the Chicago and Western Indiana Railroad Company, the properties purchased by Fetzer with the funds of the Chicago and Western Indiana Railroad Company, the amounts alleged to have been falsely

reported by Fetzer as paid for the properties purchased; averred that the checks shown and the receipts returned to the Chicago and Western Indiana Railroad Company by Fetzer as evidence and vouchers of the payment of the amounts for the purchased properties were false and were not the checks paid to the vendors nor the receipts of the vendors, but were checks paid to dummies and receipts from dummies selected by Fetzer, Thomas, or Kappes, in pursuance of a conspiracy or arrangement to defraud the Chicago and Western Indiana Railroad Company; that in consequence the Chicago and Western Indiana Railroad Company had been defrauded of a very large amount of money, the exact amount being unknown; that this money was divided among Fetzer, Thomas and Kappes.

The cross bill prayed that Fetzer be required to account for the moneys so received by him from the Chicago and Western Indiana Railroad Company for the purchase of the properties; that Fetzer, Thomas and Kappes be decreed to pay the amount found due on the accounting, to surrender to the Chicago and Western Indiana Railroad Company the bonds fraudulently obtained and retained by them respectively; that Fetzer be decreed to have received certain lots in Block 6, South Branch Addition, in trust for the Chicago and Western Indiana Railroad Company, which he had purchased with the funds of the Chicago and Western Indiana Railroad Company but had not conveyed to it.

The answer of Fetzer to the cross bill denied knowledge of the amounts paid to the Chicago and Western Indiana Railroad Company by Thomas and Kappes under the award, and alleged that any sums so paid were paid severally in full discharge of all claims under said award; admitted that Fetzer paid nothing under the award; denied any indebtedness to the Chicago and Western Indiana Railroad Company on the transactions alleged in the cross bill; denied that

Fetzer acted as agent for the Chicago and Western Indiana Railroad Company; and adopted the allegation in Fetzer's bill in regard to his employment; admitted that Fetzer purchased and conveyed properties as alleged in his bill, and adopted the allegations in his bill in that regard; alleged that he received from the Chicago and Western Indiana Railroad Company the sums of money set out in his bill, and adopted the allegations of his bill in that respect; denied that Fetzer cheated or defrauded the Chicago and Western Indiana Railroad Company, or made any false representations in regard to the properties, or the titles thereof or in regard to the persons from whom they were bought or in conveying them, or in any matter or thing connected with them; denied that he acted as agent in making the purchases, or fraudulently appropriated moneys or securities of the Chicago and Western Indiana Railroad Company by false representations or otherwise; denied that he conspired with Thomas and Kappes or either of them; denied that he held any property or securities of the Chicago and Western Indiana Railroad Company, or in which that company has a lien or interest; denied that he held or ever received, as trustee, the properties described in the cross bill; alleged that the award was illegal and void for the reasons set forth in his bill.

In an amended answer to the cross bill Fetzer made certain allegations in regard to particular transactions. These allegations will be noticed in the discussion of those transactions.

The answer of Thomas to the cross bill admitted that Thomas and Kappes paid $76,000 on account of the award; denied that the award was valid; denied all allegations of conspiracy and collusion; admitted that Fetzer was authorized to purchase the properties, but denied knowledge as to how he was employed by the cross complainant to purchase them; denied that the cross complainant is entitled to an accounting or to any relief; denied that any money

or bonds were divided among Thomas, Fetzer and Kappes.

The answer of Kappes to the cross bill denied that Kappes and Thomas paid $76,000 on the award; alleged that Kappes turned over to the cross complainant property of unfixed value less than said sum, but denied knowledge of any payments by Thomas; denied knowledge of the amounts of money placed in Fetzer's hands by the cross complainant and the specific properties purchased by Fetzer, or whether Fetzer purchased the properties on his own account or for the cross complainant; denied the allegations in regard to the conspiracy to defraud the cross complainant.

The evidence is voluminous. The record consists of 7909 typewritten pages, and the abstract of 1431 printed pages. The labor of writing the opinion, however, has been lightened by the thorough, able briefs of both counsel for the cross complainant and counsel for Fetzer.

The question which we think logically should be determined first, is whether in his dealings with the cross complainant Fetzer was acting as an agent or as an independent vendor. If he was acting as an agent, his legal obligations to the cross complainant would be materially different from his obligations as an independent vendor.

There was no written contract between Fetzer and the cross complainant. The terms of the contract were arranged verbally between Fetzer and Thomas, and were approved by a resolution of the board of directors of the cross complainant. It was simply agreed that Fetzer should purchase property for the cross complainant in the same manner that he had previously purchased property for the Wabash Railway Company under an agreement with that company. The agreement with the Wabash Railway Company was that Fetzer should buy at the

best prices obtainable, such lands for that company as Delano, the president of the company, should specify; and thatFetzer should receive his commissions for his services from the vendors of the properties; but that if a vender in any instance did not pay the usual or a satisfactory commission, Fetzer might render a bill to the Wabash Railway Company if he thought it fair "after the whole matter was concluded."

In his testimony relating to the agreement between him and the cross complainant, Fetzer stated that in June, 1906, Thomas telephoned him to come to his, Thomas', office; that Thomas asked him how he was getting along with his purchases for the Wabash Railway Company; that he, Fetzer, told Thomas he was getting along all right; that Thomas wanted to know how he, Fetzer, was getting along with Kappes; that he, Fetzer, replied that he was getting along satisfactorily; that Thomas said, "You f und him a valuable assistant?" that he, Fetzer, said that he certainly had; that Thomas said, "I know you are getting along all right with the Wabash; they are very well pleased with the way you are doing; and I want you to purchase some property if you will;" that Thomas said, "You can probably use Mr. Kappes in these matters as you are now, advantageously;" that he, Fetzer, said, "I should think so. I used him very advantageously this time;" that Thomas said, "And you and he are getting along nicely?" that he, Fetzer, said, "Yes, very nicely, indeed;" that Thomas then sent for an employee of the cross complainant named Wilbern, who was in the outer office, and asked him to bring some maps; that he, Fetzer, thinks they were the maps of three railroad yards, - South Chicago, Hayford, and West Twelfth street; that Thomas showed him, Fetzer, what he wanted to accomplish and asked him to take it up with Kappes; that before that Thomas got

Kappes into his office and said that Fetzer was going to do some work for the Western Indiana [the Chicago and Western Indiana Railroad Company], the cross complainant "the same as" he, Fetzer, "had been for the Wabash;" that he, Fetzer, would take the matter up with him, Kappes, and for him, Kappes, to give him, Fetzer, any information that he, Fetzer, wanted; that he, Fetzer, went to Kappes' office, outlined some of the properties, got all the information he, Kappes, had, and "mapped out a course of campaign;" that Kappes wanted to know if the compensation would be the same as it had been in the Wabash matters and "would go along in the same way;" that he, Fetzer, told Kappes yes, that he, Fetzer, would make the compensation satisfactory; that he, Fetzer, immediately undertook the purchase of the properties.

Kappes, called as a witness on behalf of Fetzer, testified that his first employment by Fetzer was with reference to the Wabash Railway Company; that when he was employed by Fetzer in connection with the purchases of property for the cross complainant he did not understand that Fetzer was acquiring any property directly for the cross complainant; that he understood that Fetzer had an arrangement to acquire the property for himself under an arrangement by which he was to take over the bonds, or something else of the cross complainant, finance these himself, handle the property as best he could with the bonds, and acquire the property at a general lump sum that had been agreed upon; that he, Kappes, does not mean to say exactly that he, Fetzer, was to acquire the property for himself for a general lump sum, but that Fetzer had indicated a general lump sum at which he could acquire the property; that he, Kappes, understood that from Thomas.

Kappes testified further that he understood substantially that Fetzer was buying the property for himself, and that he was to

re-sell it to the cross complainant; that Fetzer was to be the real vendor to the cross complainant and the cross complainant was not to look beyond Fetzer; that it was his, Kappes', understanding that the cross complainant was to have no relations with the persons from whom Fetzer might buy and, therefore, it would be unimportant whether Fetzer paid one price or another price to the vendor.

Kappes testified further in this respect that he did not at all times understand that Fetzer was the seller to the cross complainant; that he, Kappes, did not know how Fetzer was handling his purchases, except as Fetzer told him; that Thomas did not tell him, Kappes, that Fetzer was the man who was the real seller to the cross complainant; that nobody told him except Fetzer. In regard to who was to supply the money for the purchases of the property, Kappes testified that he did not understand definitely from whom the money was to come other than when Fetzer employed him Fetzer stated that the money would come from the Wabash Railway Company; that when Fetzer employed him in the matter of the purchases for the cross complainant, he, Kappes, had no specific understanding where the money was to come from; that he had a general understanding that it was to come by some process of Fetzer's handling bonds; that only by inference was he, Kappes, aware of the fact that the entire consideration, whether in bonds or in money, was to be furnished by the cross complainant to Fetzer with which to make the purchases; that he did not know that in addition to bonds, Fetzer received a very large sum of money from the cross complainant to make the purchases; that if it was true, this was the first time that it has been called to his attention except as it appeared in this litigation.

John E. Murphy, treasurer of the cross complainant,

called as a witness on behalf of the cross complainant, testified in respect of the employment of Fetzer by the cross complainant, that he, Murphy, met Fetzer for the first time on January 31, 1907, in the office of Thomas; that he was called into the office by Thomas and introduced to Fetzer by Thomas; that Thomas said that he, Thomas, was going to buy a lot of property between 23rd and 29th streets along the right of way, and that he had been authorized by the board of directors to employ Fetzer to buy the properties for the cross complainant; that the method to be followed was that "we would make vouchers in favor of Fetzer for round sums of money for advances to him on account of purchases of property;" that Fetzer would take the money into his own account and check against it as he made the purchases, and account to the company by furnishing receipts from the sellers of the property; that Thomas said that Fetzer had been introduced to him as a good man by Delano; that Delano had used Fetzer for the Wabash Railway Company in purchasing real estate.

Thomas did not testify.

When the above evidence in regard to the status of Fetzer in relation to the cross complainant is considered in connection with the pleadings, the record presents some strange inconsistencies. Fetzer explicitly alleged in his bill that he "was not and never became the agent or employee in any way" of the cross complainant; Thomas in his answer to Fetzer's bill averred on belief that this allegation was true; Fetzer in his answer to the cross bill expressly denied that he was the agent of the cross complainant.

Notwithstanding these allegations in the pleadings, Fetzer testified that he was the agent of the cross complainant in some of the purchases of the properties, and was the independent vendor in others. These latter purchases we shall discuss in detail later.

After considering all of the evidence in the case bearing on the question whether Fetzer was the agent of the cross complainant or was an independent vendor, we are of the opinion that Fetzer was the agent of the cross complainant in all of the purchases of properties, and that he did not act as an independent vendor in any of the purchases; that the original agreement, as testified to by Fetzer himself, contemplated that Fetzer should act as the agent of the cross complainant in all of the purchases of the properties; that this agreement was approved by a resolution of the board of directors of the cross complainant; that Thomas was never authorized by the board to change the agreement; that if Thomas changed the agreement so as to allow Fetzer to act as an independent vendor, the directors did not know of such change. The testimony of Kappes to the effect that he understood that Fetzer was an independent vendor in all of the purchases of the properties is at variance with the testimony of Fetzer that he was the agent of the cross complainant in all of the purchases, except several that he indicated; and Kappes' testimony in our opinion is also contrary to all of the other evidence in the case relating to the question whether Fetzer was an independent vendor. We reject Kappes' testimony as unworthy of belief.

Since we hold that Fetzer was the agent of the cross complainant under the agreement entered into between him and the cross complainant, Fetzer occupied a position of trust and confidence toward the cross complainant. (Salisbury v. Ware, 183 Ill. 505, 511.) Fetzer owed the duty to the cross complainant to give the cross complainant the benefit of all of his ability, skill and industry in making the purchases of the properties; and the cross complainant was entitled to the properties at the price that Fetzer paid for them. Salisbury v. Ware, supra, pp. 511, 512. All of the profits or advantages gained in the transaction belonged to the

cross complainant. Cotton v. Holladay, 59 Ill. 176, 179.

The law will not permit an agent, without the assent of his principal, to acquire an interest in the subject matter of the agency adverse to that of his principal. The agent must act solely for the interest of his principal while executing the trust. The law will not permit an agent to place himself in a position where he may be tempted to abuse the confidence reposed in him by his principal. Agency is a trust voluntarily assumed, and it must be executed in the utmost good faith. Cotton v. Holladay, supra, (pp. 176, 179.)

It has been said that "a trustee may not put himself in a position in which to be honest must be a strain on him." Tyler v. Sanborn, 128 Ill. 136, 142. In Corpus Juris (vol. 2, pp. 694, 695) the rule is stated as follows: "Good faith and loyalty to the principal's interest require that an agent must not, except with his principal's full knowledge and consent, assume any duties or enter into any transaction concerning the subject matter of the agency in which he has individual interests, or represents interests adverse to those of his principal. He cannot, without the knowledge and consent of his principal, represent himself and the principal where their interests conflict; and he must not put himself into such a position that his interests become antagonistic to those of his principal, or speculate in the subject matter of the agency. This rule is adopted on the ground of public policy, in order to remove from the agent all temptation to neglect his principal's interest."

In the case of Tyler v. Sanborn, supra, the court held (p. 143) that "it is of no consequence that no fraud was actually intended, or that no advantage was, in fact, derived from the transaction by the agent;" that "the rule is not merely remedial of wrong actually committed, - it is intended to be preventive of wrong."

In the Encyclopaedia of Law and Procedure (vol. 31,pp. 1440, 1441) it is stated that "an agent authorized to purchase property for his principal must not, except with the principal's full knowledge and consent, purchase the property for himself directly or indirectly; and in accordance with this rule, an agent employed to purchase cannot purchase the property for himself and then resell it to the principal at an advance. If the agent is guilty of wrongdoing in this respect the principal, when he acquires knowledge of the facts, may at his election avoid the transaction, whether the agent acted fraudulently or not; or he may compel the agent to account for any excess he received above the real value of the property."

The rule is also well settled that it is ordinarily the duty of an agent to keep true, regular and accurate accounts of all of his transactions and dealings in the subject matter of the agency, as to both the receipts and disbursements; and to be ready to render to his principal a full and complete statement of his dealings, and of the state of the accounts between them, supported by proper vouchers; or to show some good reason for not doing so. 2 Corpus Juris, 738, section 404.

It is the rule that where the defendant is an accounting party, as one occupying a fiduciary relation, the burden is on him to show the performance of his trust; and one who is liable to render an account has the burden of proving allowances or credits which he may claim. I Corpus Juris, p. 643, section 129.

An agent who fails to keep an account raises thereby a suspicion of infidelity or neglect, creates a presumption against himself, and brings upon himself the burden of accounting to the utmost for all that has come into his hands; and in such case every doubt will be resolved against the agent and in favor of the princi-

pal; and if the agent renders an untrue account, giving a false balance, he becomes at once liable to his principal. 2 Corpus Juris, p. 739, section 404.

In the case of White v. Sherman, 168 Ill. 589, in which the use of trust funds by the trustee of an estate was involved, the court said (p.604): "The authorities are uniform to the effect that the trustee may not deposit the trust funds in his own name;" and the court also said (p.604): "The doctrine is a familiar one, that every presumption is indulged against the trustee who has personal dealings with the trust."

The case of White v. Sherman, supra, was cited with approval by the Supreme Court in the recent case of The People v. Small et al., in support of the following rule: "Where it is established that a public official having public funds in his custody deals with the trust money in his own name directly or indirectly, every presumption is indulged against the trustee and is held to a strict accountability for the conversion."

The evidence shows many instances of large differences between the amounts actually paid the vendors of properties and the amounts which Fetzer reported as having paid them. In a number of the transactions Fetzer has admitted that there are deficits and has attempted to explain the deficits. His explanations, however, in our opinion do not extricate him from his difficulties. Two questions arise in connection with Fetzer's explanations, - first, are they true; and second, even if true, are they sufficient in law. In our view his explanations contravene probability, and before they should be accepted as true they should be corroborated in proportion to the contravention of probability. They have not been corroborated. It has been said that probability is the only guide in the affairs of life. It is also the only criterion that may be used in determining the credibility of legal testimony. Many of Fetzer's explanations, even if accepted as true, are insufficient in law.

The evidence shows that although the transactions were extensive and complicated, involving dealings with one hundred and twelve different vendors, and the disbursement of and accounting for $2,764,500, yet Fetzer did not keep any books of account of the purchases of the properties; that the only records he had were checks, check stubs and letters; that these checks and check stubs in some instances indicated payments to one person, when, according to Fetzer's testimony, they were in factpaid to another; that Fetzer kept no separate bank account for the money used in connection with the purchases of the properties; that he had four bank accounts, two in his own name, one in the name of

Robert Flemming, a dummy, and one in the name of Edward H. Peters, his partner; that Fetzer's check book covering the period from November 6, 1906, to March 4, 1907, according to Fetzer's testimony, was lost; that during this period Fetzer received from the cross complainant sums of money amounting to $715,000; that Fetzer never made any statement of account covering the purchases of the properties until he prepared one shortly before filing his bill to set aside the award; that in respect of this statement Fetzer testified as follows: "This was all gotten up very hastily at the time we were negotiating for the purpose of arbitration as near as I could. I didn't have any time to go searching around for hidden records or anything of that kind, or lost records." The evidence shows further that in many instances the reports made by Fetzer to the cross complainant in respect of purchases of properties were false and concealed amounts which had not been paid for the properties.

On the authorities which we have cited above announcing the principles of law governing agency, since Fetzer failed to keep an account and made false reports, a suspicion of infidelity or neglect is presumed against him, and the burden of accounting clearly and honestly for all of the moneys that have come into his hands is imposed upon him; furthermore, every doubt will be resolved against him and in favor of the cross complainant.

The first purchase that Fetzer made for the cross complainant was the property referred to as the Hanks property. This property was to be used in connection with what are called the "Hayford Yards" of the cross complainant. The property was owned by Mrs. Clarinda B. Hanks, who resided in the city of Boston, Massachusetts. Mrs. Hanks was the wife of Charles S. Hanks. Fetzer reported to the cross complainant that he had purchased this

property for $180,000, when in fact he had paid $150,000 for the property. The cross complainant showed by the testimony of Mrs. Hanks that she had received only $150,000. Charles S. Hanks, the husband of Mrs. Hanks, died before the case at bar was begun.

Fetzer purchased the Hanks property with funds furnished to him by the cross complainant. The documentary evidence showed that he used a check of $1,000, payable to himself, and a check for $179,000, also payable to himself, in connection with the purchase of the property; and that he obtained a draft of the Shawmut National Bank of Boston for $20,000, payable to his own order. In the circumstances it was incumbent on Fetzer to explain the discrepancies. His explanation is so improbable and so involved that we will not state our interpretation of his testimony, but will quote from his testimony as it appears in the abstract.

On direct examination Fetzer testified as follows: "There was one party that Kappes said he did not think I would get a price from, a man named Hanks, who owned some property at Hayford. Kappes said they were unable to get a price from him; he had it up, and said his agents were unable to, and that he was a very peculiar man. ** I went to Boston and took with me a certified check to my own order for $1000 and $10,000 in currency if I needed any more to advance. *** I found that they [the Hanks] were in a house boat somewhere in the ocean. ** The house boat had come into Newport and was anchored. I got a boat and went out to the house boat and saw Mr. Hanks. He was a very pleasant gentleman; said the property belonged to his wife; that he didn't care to put a price on it; that he didn't need the income from it and that it was hers, and she didn't want to have the responsibility of putting a price on it; that he had a son and daughter, and when they came of age if they wanted to sell it they could, but it was not worrying him any and he didn't care to sell it. ** Hanks was the

classmate of Roosevelt at Harvard and was investigating railroads for him in some private capacity; had been on the Citizens' Committee fighting the New Haven and the South Station in Boston. When we began to talk about railroads and terminals he got interested and said he would see his wife. She was in another part of the boat; there was a large room across the end, a sitting room or library, that was the only room I was in. He left ostensibly to talk with his wife, and when he returned he said they didn't care to sell. Finally he said, 'You give me more information and I will see what I can do for you tomorrow.' He said he was not a business man and didn't like to sell, but he would like to oblige me, and said, 'Now if I get you a price on this property that you can use it at, I ought to have some pay for my services. I have been to a good deal of expense here in the investigations I have been making for Roosevelt, and I have spent more money than he has allowed me,' and he said, 'Whatever I get I expect to spend it in a public benefit anyway, but you cannot get a price unless I get it for you; nobody else can get you a price and it ought to be worth something.' I said it depended on what kind of price he got from Mrs. Hanks. I asked him what he thought he ought to have, and he said he thought he ought to have $25,000. ** I said I hoped to buy it [the property] for $2,000 an acre. ** He said he would see me the next day, and he did see me every day for five days. ** In his last visit he made a price of $3,000 an acre. I said I couldn't pay him and pay anything for getting the property; that that would be an outside price, and I should have five per cent. commission on any price that I had to pay him, and I could not possibly do more than that. He said if I paid him $3,000 an acre and I got five per cent. it would be $9,000, and if I got the property so that it cost $150,000, would I be willing to give him $31,000, and I said I certainly would. I made a contract

and gave him the $10,000 and the $1,000 check at that time; and made a contract reciting the $1,000 check and the purchase of the property at $150,000 and got a memorandum receipt for the $10,000, which I agreed to give up when the deal was closed in Boston later; and I came back to Chicago and was to get the other $10,000 and make preparations to close the deal and buy the entire property. I told Mr. Thomas that the matter was a little complicated, but that I got it for $3,000 an acre. Thomas approved of the deal, and I told him I needed some more money to purchase the property. I think he wanted to know how much more I wanted. I said $100,000 and he advanced me another $100,000; and I got a certified check then to my own order for $179,000. ** Next I notified Banks that I would arrive in Boston Sunday prepared to close at the Touraine Hotel Monday morning. ** We got a notary in the Touraine Hotel to acknowledge Mr. and Mrs. Banks' signatures to the deed. I told Banks that I had a check drawn to my own order - I did not tell them for what amount - to close up this entire transaction, and if he would go with me to the bank I would get the check cashed and make the disbursements. ** I told him I had a letter of introduction to the National Shawmut people. ** When I got there I gave him his additional $10,000 in currency which I had taken with me, and told the bank that I wanted to get this cash and that I would get a cashier's draft for $9,000, which I think I did. I don't remember whether I got the $20,000 in currency, or got a cashier's check for that to replace the currency I had taken from Chicago or not, but I think I got a cashier's check from the Shawmut bank. ** I never had any communications with Mrs. Banks that I remember of at all, other than I have testified to here. I am positive that if her testimony would tend to show that she thought she saw me on the boat the first time I went aboard, I think it incorrect. Of the $180,000 paid for the Banks' deed, $9,000 in a draft to the order of Edward H. Peters

remained in my possession. I think I mailed it to him."

On cross examination Fetzer testified as follows: "As to the Hanks matter I undertook the purchase and went to Boston to purchase it. ** I went down as an agent of the railroad to purchase it. I don't know as I made my negotiations as agent of the railroad. When I found this was going this way I made up my mind that I didn't want to do it as an agent for the railroad. I thought it ought to be a direct proposition; and I submitted it that way to Thomas and wrote him a letter and told him I would sell the property at so much money. *** The first trip I took $10,000 in currency, and I took $1000 in a certified check to my own order. The $10,000 in currency was provided the $1,000 check would not be accepted to bind the bargain. I didn't take $11,000 in currency because I would rather have a receipt for it. I didn't take a $11,000 check. I wanted to have the currency or a certified check. I had the $10,000 in currency in bills. I do not remember what the size of them was. If I took a check I knew I would want it certified, and so I took $10,000 in currency, and I took the $1000 check in the hope that would be enough for the first payment. I took a certified check. If I had taken $11,000 in certified check I could not get on that in Boston any amount that I wanted to put up. *** I expected Mr. Hanks to take a certified check for $1,000, and if he didn't to take the currecy. I can't tell what form the currency was in. I took it out of my safety deposit vault; in those times I usually had at least for use $10,000 in my safety deposit vault. I am sure of that; I have not looked it up. The purpose why I took the $10,000 out of my safety deposit vault, instead of checking on my bank was because I could make a tender, and I had it in gold so as to make a legal tender. I didn't take the gold to Boston. I said I had gold certificates, that is the legal tender.

It might be the proper way of doing business to take my check to the bank and get the legal tender, but it was not the way I did it in those days. *** Before I came back I gave him [Hanks] the $1,000 check and the $10,000 in currency and took his receipt for it. He gave me a receipt for the ten and a contract for the one. In my direct examination I said he gave me a memorandum receipt. A receipt is on a receipt blank, in regular form. A memorandum receipt is made on a blank piece of paper or letter head or bills or something of that kind; and this was a letterhead or something of that kind. It was given back to Hanks when the deal was closed in Boston at his request. I can't produce the receipt. I know that Hanks is dead. The testimony, 'I ~~ment~~ got a memorandum receipt for the $10,000 which he agreed to give up when the deal was closed in Boston later' is incorrect. *** I took a check for $179,000 because I wanted to get Hanks' receipt on the back of it if I could. I didn't get it. I know of no receipt from Mr. Hanks showing that he received any of this money. That is the reason I took $179,000 when I needed but 169,000. In addition to the $179,000 I had 10,000 in currency. Because I thought I might not get the receipt, and I didn't like to ask the bank for ten thousand in currency, so I took ten thousand in currency. I think it was gotten from the National Bank of the Republic on a memorandum. I don't think on a check. I think I had to borrow it practically. I don't remember exactly. I expected I might use it or might not. I don't remember exactly, but I think I got it there. I wouldn't say I got it there absolutely. ** I don't remember giving any note to the National Bank of the Republic for $10,000; I don't think I got it from the safety deposit vault. My impression is I did not. At that time I don't think there would have been any occasion for taking gold certificates. The reason for taking $10,000 in currency was Hanks wanted it that way when the deal was made, and

that was my agreement, and if I had to, I would carry it out. When I went I had no doubt I would be able to get money on a check to Boston, but I didn't know I had a letter of introduction in Boston, and I think I could cash it. I asked him [Hanks] to go to the bank and introduce me and tried every way I could to get his name on the $179,000 check, but was unable to do so. There was no question the second trip about my ability to cash a $10,000 check except I did not care to ask for it if Hanks was there; if he objected to having anything to do with the deal. ** I wanted Hanks to sign the check because I don't like to deposit money unless I can get a receipt. I took the $10,000 the second time in practically the same form as the first. *** I have no doubt what I received for the $20,000 was the draft of the National Shawmut Bank on the National Bank of the Republic at Chicago for $20,000, July 16, 1906, endorsed John C. Fetzer in my handwriting. I don't think it went to my account. I think it was paid to the National Bank of the Republic to lift up memorandum that they had, and get the money out and place it in the vault. It is not my recollection that it lifted a memorandum that they had, and replaced the money I had in the vault. I have no recollection in the matter that I wish to testify to. I didn't say I didn't take the $10,000 down in a check because I didn't want to have the bank pay me cash on the check. The second time I asked to have the check broken up. I didn't like to ask for so much currency. It might look suspicious, or something of that kind. I didn't care to ask for it. I think Hanks, if he objected to signing the check, would object to the whole thing."

We do not deem it necessary to discuss at length the above testimony of Fetzer in regard to the Hanks transaction. Its inconsistencies and improbabilities are obvious. Tested by the standards governing agency which we have heretofore stated, Fetzer's

explanation of his false report is unconvincing. But Fetzer says he was not an agent in the transaction; that he was an independent vendor; that Thomas approved of the deal. We are clearly of the opinion that the evidence shows that Fetzer was an agent. There is no evidence that the original agreement between the cross complainant and Fetzer in respect of the purchase of property by Fetzer for the cross complainant was modified by the board of directors so as to permit Fetzer to act as an independent vendor in this transaction; nor is there any evidence that the board of directors of the cross complainant knew that Fetzer was acting as an independent vendor. If Thomas permitted Fetzer to change his status from that of an agent to an independent vendor, Thomas acted without authority, and he was merely aiding Fetzer to accomplish a fraud on the cross complainant. There are significant, specific facts in evidence that indicate that Fetzer was an agent and not an independent vendor. He purchased the property with money furnished to him by the cross complainant; he paid the bill for the guaranty of the title of the property to the cross complainant; and he made a report of the transaction to the cross complainant. The report, however, did not show that Fetzer had paid Hanks $21,000, as Fetzer claims he did, or that Fetzer was retaining $9,000 as his commissions. But there was no necessity of a report at all if Fetzer was really an independent vendor.

In regard to the $1000 check, the $179,000 check, the two items of $10,000 each in currency, the $20,000 draft of the Shawmut National Bank of Boston on the National Bank of the Republic of Chicago payable to Fetzer's order, Fetzer's testimony is unsatisfactory and insufficient. In considering Fetzer's testimony in this respect we cannot ignore the fact that Fetzer was confronted with the documentary evidence of the $1000 check, the $179,000 check, the $20,000 draft of the Shawmut National Bank of

Boston, and could not, therefore, deny the existence of those amounts, but was forced to offer an explanation of them. It will be observed that Fetzer testified that on his first visit to Boston he gave Hanks the $1000 check and the $10,000 in currency. Assuming that to be true, then according to Fetzer's testimony that Hanks was to be given an additional amount of $10,000, that he, Fetzer, was to receive $9,000, and that the amount to be paid for the property was $150,000, the total amount necessary for Fetzer to have taken to Boston on his second trip was $169,000. But instead of taking $169,000 he testified that he took a check for $179,000 and $10,000 additional in currency. In other words he took $20,000 more than he needed. Furthermore, according to Fetzer's testimony, $9,000 of the $179,000 check which he took to Boston on his second trip was for his commissions; and the $9,000 was put in the form of a draft and mailed to his partner, Edward F. Peters, at Chicago. But why was it necessary to take the $9,000 to Boston, get a draft for it to the order of Peters, and then mail it to Peters at Chicago? We will not repeat the reasons Fetzer gave for taking the $179,000 check and the $10,000 in currency on his second trip to Boston. We have set out fully his testimony in this respect, and we think that obviously it appears from the testimony that the reasons he offers are not satisfactory. We have also stated at length Fetzer's testimony in regard to where he got the two items of currency of $10,000 each, and what he did with the draft of the Shawmut National Bank of Boston, which he testified was to "replace" the two items of currency. All of this testimony in our opinion is indefinite and evasive.

So far we have considered Fetzer's testimony internally. But there is external evidence which contradicts his testimony in material respects. It will be recalled that Fetzer tes-

tified in substance that negotiations for the sale of the property were carried on between him and Hanks out of the presence of Mrs. Hanks on a house boat; that Hanks told him that Mrs. Hanks did not want to sell the property, but that he would induce Mrs. Hanks to sell if he, Fetzer, would pay him $21,000.

Mrs. Hanks testified that she met Fetzer on the house-boat but did not remember of talking about business with him; that her husband told her that Fetzer had called about buying the property for a railroad, and that he told her the price was to be $150,000, although the first offer was a lower price; that she does not remember that at the time she executed the deed at the Touraine hotel, Fetzer and her husband went out and left her at the hotel; that she does not remember that her husband left her at all.

The check for $1000, which Fetzer testified positively that he paid to Hanks on his first trip to Boston, was introduced in evidence, and shows that it was paid to Mrs. Hanks. It is true that Mrs. Hanks did not remember the payment but she identified her signature on the check. The endorsement on the check is as follows: "Pay to the order of Clarinda B. S. Hanks, John Fetzer, Clarinda B. S. Hanks." The notations on the check indicate further that the check was paid by the Commercial National Bank of Chicago on July 18, 1906. The evidence shows that this was the same date on which the check for $179,000 was paid at Chicago by the National Bank of the Republic. The check for $179,000 was taken to Boston by Fetzer on his second trip and was cashed in Boston by the Shawmut National Bank on July 16, 1906, the date on which the deal for the property was consummated. The inferences are clear, therefore, that the check for $1000 was paid on Fetzer's second trip to Boston, not on his first, as he testified it was;

and that it was paid to Mrs. Hanks, and not to her husband, as Fetzer testified it was.

When Fetzer's testimony is considered in connection with the other evidence relating to the purchase of the Hanks property, we are clearly of the opinion that Fetzer was guilty of fraud against the cross complainant; and that furthermore, even if the question of fraud was eliminated Fetzer has reasonably failed to account for the difference of $30,000 between the price actually paid for the property and the amount which he falsely reported that he had paid. It follows therefore that Fetzer should pay to the cross complainant the sum of $30,000.

In the purchase of the Hanks property Kappes approved the two checks payable to the order of Fetzer, namely, the check for $1000 and the check for $179,000, after Thomas had referred them to him for his inspection.

In respect of the Hanks purchase there was correspondence between Thomas and Fetzer and Thomas and Kappes which was as follows: The day after Fetzer had closed the deal in Boston he wrote to Thomas from Boston, saying: "I beg to enclose you herewith quit-claim deed from myself and wife to the Chicago and Western Indiana Railroad Company for sixty acres sold you for the 'Hayford Yards' at $3000 per acre." On July 23, 1906, Fetzer sent Thomas a bill of the Chicago Title and Trust Company for $945, part of which was for the guaranty of title of the Hanks property. On July 23, 1906, Fetzer wrote Thomas that the purchases of property for the "Hayford Yard" had been completed and requested Thomas to "authorize some one for you to check up my bank checks in this transaction." On July 24, 1906, Thomas sent Fetzer's letter to Kappes directing him "to make the examination suggested" by Fetzer. On August 3, 1906, Kappes wrote to Thomas stating that the "checks were all exhibited

to him and found to correspond with the list attached."

The foregoing correspondence between Thomas and Fetzer and Thomas and Kappes shows that although Thomas and Kappes knew that Fetzer was pretending to be an independent vendor, and was, therefore, under no duty to make a report of his disbursements to the cross complainant, yet Thomas and Kappes went through the formality of approving Fetzer's report; and also of approving a bill for a guaranty policy, which, if Fetzer was an independent vendor, should have been paid by Fetzer. Furthermore, Thomas and Kappes permitted Fetzer to retain $9,000 as commissions for selling to the cross complainant property which Fetzer claimed was his own. Kappes received as his share of the transaction part of the commissions, namely $4500, which was 2½% on $180,000, the amount Fetzer falsely reported that he paid for the property, and the amount on which Fetzer estimated his commissions of $9000. As we think that Fetzer was guilty of fraud it follows that he is not entitled to the $9000 as commissions, which he divided with Peters and Kappes. Although it does not appear that Thomas received any money in the Hanks purchase, the evidence shows that in other purchases he received fraudulently large sums of money from Fetzer.

We are of the opinion that Thomas and Kappes were in a conspiracy with Fetzer to defraud the cross complainant in the Hanks transaction.

The purchase of property known as the Jennings purchase and the purpchase of property known as the Barry purchase may be considered together.

In the Jennings purchase the property was reported by Fetzer as having been purchased from Augustus Jennings. In the Barry purchase the property was reported by Fetzer as having been purchased from Charles L. Barry. Both Jennings and Barry were dummies. In referring to the use of dummies in the purchases in question and in the purchases hereafter discussed, we do not intend to convey the idea that the use of dummies is, in itself, improper. We recognize that dummies may be employed properly in complicated real estate purchases. But we think that the evidence shows that in the purchases in question and in the purchases hereafter discussed, Fetzer used the dummies to assist him in his fraudulent purposes.

The Jennings purchase embraced seven separate purchases. Kappes supervised the purchases in question under Fetzer's directions. The amount reported by Fetzer as the cost of the properties was $145,600. The vendors received only $77,350. There was a deficit, therefore, of $68,250.

The Barry purchase was composed of nine separate purchases. The amount reported by Fetzer was $130,000. The vendors received only $103,600.

In the Jennings-Barry purchases the total deficit was $94,650. Fetzer admitted a deficit of $73,100, and disputed the remainder of $21,550. We think, however, that the evidence shows a deficit of $94,650. A significant fact in this connection is that on the very date that Fetzer gave his check to Jennings, a deposit of $94,000 was made in Fetzer's bank account. Fetzer attempted to account for the admitted deficit of $73,100 by stating that he added to the amount of the purchase $13,100 for his commissions, and $60,000 which he paid by direction of Thomas to Francis S. Peabody, as a contribution to the campaign fund of Fred A. Busse when Busse was running for Mayor of the city of

Chicago. Fetzer testified that Thomas wanted to have the tracks of the General Electric Railway removed from Plymouth court and Dearborn street near the Dearborn street station in the city of Chicago, and that the contribution was made on the promise of Busse that if he was elected mayor he would cause the removal of these tracks.

The principal question to be determined is whether Fetzer legally is entitled to be credited with the $60,000 which he says he paid as a campaign contribution. Fetzer's testimony as to the amount of the contribution was not corroborated by Peabody. On the contrary Peabody testified that he had no recollection of the amount; that it was a large sum; that it was "more than $25,000." According to Delano's testimony, after the time the $60,000 is alleged to have been paid, $15,000 was contributed by Thomas for the cross complainant to the Busse campaign fund on the promise of assistance from Busse to remove the tracks of the General Electric Railway. Delano testified that on one occasion he questioned Thomas in regard to a voucher for $15,000 which had been issued in favor of Thomas, and had been charged to the track elevation fund, and that Thomas said that the $15,000 was a contribution to the Busse campaign fund that "had been made with a promise of assistance among other things, that the track of the General Electric Railway in Exchange place, a street that runs past the depot, between Polk and Dearborn streets, would be taken up." The testimony of Delano is uncontradicted.

In connection with the contribution of the $15,000, it should be stated that a few days after the voucher was issued for the $15,000, Thomas wrote a long letter to Fred W. Upham, treasurer of Busse's campaign for mayor, in which, speaking of the General Electric Railway, Thomas said that "it was only a

question of time, and a very short time, when we shall be able to fire them out of this territory, but we want them to get out now." This letter is marked "Void." Immediately following this letter there is the following notation in the abstract: "On page 882 [of Thomas' letter-book] is another letter to Mr. Upham, practically the same as the previous letter. Agreeable to Mr. Platt, Mr. Scott noted slight variations in language used, but the purport was unchanged and stated that apparently this was the letter that was sent and not the previous one." The letter referred to as being on page 882 of Thomas' letter-book and as having been sent to Upham, is not set out in the abstract. Whether it contains the identical language which we have quoted from the other letter we do not know. But even if the other letter was not sent to Upham, the language which we not out shows the situation in regard to the removal of the tracks of the General Electric Railway.

It is most improbable that if a contribution of $60,000 had already been made on Busse's promise that, if elected he would remove the tracks, Thomas would contribute $15,000 further on the same promise. That the contribution of $15,000 was in fact made, is evidenced by Thomas' statement to Delano in explanation of the voucher which had been issued for the identical amount of $15,000. The contribution of the alleged $60,000 reasonably cannot be reconciled with the subsequent contribution of the $15,000. The inference is not without support from the evidence that the only contribution that was made was the contribution of $15,000. Fetzer's testimony as quoted from the abstract in regard to the alleged contribution of the $60,000 is as follows:

"When I was negotiating with Peabody he was very anxious that Busse should be nominated and elected mayor, and he wanted me to see if Thomas would not make a contribution for the Western Indiana toward his nomination and election, a substantial contribution.

I didn't get very far with Thomas. Asked him respectfully, as Peabody told me. Thomas was interested in getting the General Electric out of Plymouth place, it divided their property. Thomas told me that Bowen had named a price of $750,000 or something like that, which was preposterous, and they had a man named Minzisheimer who had told Bowen that it was interested and that the Western Indiana had agreed to share in the purchase by the City Railway of the General Electric Railway. Thomas said he never agreed, and because Minzisheimer said he did, Bowen is unreasonable. He was very much excited. He said they have a right to come down on the other side of the Western Indiana [the cross complainant], but we have not any success in the suit trying to get them out. He said, 'If I was sure that Busse would order those tracks out and can have a definite assurance of it, our company would be prepared to make a very substantial contribution.' So I said, 'I will see Mr. Peabody and see what he says about it.' So I seen Peabody. The matter was new to him and he and I talked about it, and he said at once he thought that could be arranged, so I had two or three visits back and forth. I went to Thomas and asked him what he had in mind if Busse was elected. He said he could order it out, and if elected the suit would be pressed and they would be thrown out. At that time there was a city ordinance for the renewal of the franchises of the City Railways for consideration and Thomas was anxious that this owned by the City Railway should not be incorporated. I seen Peabody then and told him what Thomas thought Busse would do, and he said he would see Busse, and for me to find out what Thomas would pay. I told him that Thomas said he would make a very substantial contribution if Busse would make a positive agreement that they would go out. So I seen Peabody and he said, 'Supposing Busse makes the promise direct to General Thomas?' I said that ought to satisfy him, so I saw Thomas and said, 'If Busse tells what he will do directly to you, will that be satisfactory?'

He said, 'yes.' Peabody was after me to see what Thomas would do, and Thomas wanted to see what it would take to get this promise from Busse. Finally Thomas offered to pay $50,000 to the campaign fund if he would make this definite promise. I think as a matter of fact that the money was not paid to Peabody until after Busse was nominated. Thomas said they would give $50,000. Peabody said that wouldn't do, that it would cost half to three-quarters of a million dollars; that they ought not to expect to get off for $50,000; that would be a collection fee of 10 per cent; that they ought to have at least $100,000. He said it was of great interest to the Western Indiana [the cross complainant] and other corporations to have Busse elected. I went back to Thomas, and finally he said the highest the Western Indiana [the cross complainant] could pay under an agreement to get the tracks out would be $60,000. Peabody said all right, he would see what he could do, and what kind of a promise he could get. He said if Busse agrees I get the $60,000. I said $60,000 currency will be paid over as soon as Thomas tells me. A day or two after he called up and said would Thomas be prepared to go and see Busse? I communicated with Thomas and he said he would. Four or five hours after the time he was to meet him, Thomas telephoned that it was all right, to deliver the money, that everything had been arranged between him and Busse. When the $60,000 was arranged, Thomas said, 'This will have to be charged to real estate; have you such an account?' I said the two blocks Kappes had been purchasing [the Jennings-Barry purchases] had not been reported, you have just approved the price. If you want the price raised from $200,000 to $275,000, I will have the $60,000 available to pay. He said, 'Let us see that we understand it.' I made a memorandum in pencil and he said, 'That is all right, you report it at $275,000 instead of $215,600.' They were so reported. I think a check for $140,600 was drawn to the order of

Jennings. The $60,000 currency in my safety deposit vault was taken out of that check, and paid over to Busse's managers. I received no part of it; received no commission, or advantage from it. The Western Indiana [the cross complainant] moneys had come into my hands under Thomas' direction; at his direction I paid out the $60,000. This was the first instance where there was any difference between the price actually paid and the price reported. This sort of thing occurred thereafter in the latter part of February."

From the testimony of Fetzer in respect of the alleged contribution of $60,000, it will be observed that Fetzer was not the passive agent of Thomas in delivering the money to Peabody, but that Fetzer solicited a contribution from Thomas at Peabody's request; that when Thomas agreed to give the alleged contribution of $60,000, on condition that Busse would order the tracks of the General Electric Railway removed, Fetzer was the active intermediary between Peabody and Thomas in arranging a meeting between Thomas and Busse. Fetzer was a party to a transaction which was at least an agreement against public morals, if not a conspiracy to do an illegal act.

Counsel for Fetzer says that the rule is that "the mere knowledge of one party to a contract that the other party intends an unlawful use of property covered by the contract will not render him <u>particeps criminis</u>."

It may be granted for the sake of argument that the rule is correctly stated by counsel for Fetzer. But the rule has no application here for the reason that Fetzer was not a party to a contract who had "the mere knowledge" that the other party intended an unlawful use of property covered by the contract. Fetzer was an active participant in obtaining the property for the unlawful use. Furthermore, the contract was not between Fetzer and

Thomas, but between Fetzer and the cross complainant. Thomas had no authority to make such an agreement with Busse; and the board of directors of the cross complainant did not know that such an agreement had been made. Fetzer admitted that the alleged contribution of $60,000 was concealed in his report by adding a false amount to the amount actually paid in the Jennings-Barry purchases. The funds out of which Thomas is alleged to have made the contribution were funds intended specifically for the purchase of real estate for the cross complainant, and it was beyond the power of Thomas to divert such funds to the payment of a political campaign contribution. Moreover, the funds were in the hands of Fetzer, as agent of the cross complainant, not as agent of Thomas; and under the well established rule of agency, the receipt of funds by an agent to be applied to a specific purpose imposes on the agent the duty not to apply the funds to another and different purpose. (Mecham on Agency, sec. 1349, p. 987, 2nd ed.) Fetzer was not justified in assuming that Thomas had authority to divert the funds to another and different purpose from that for which they were intended. According to Fetzer's own testimony he knew that the alleged contribution of $60,000 was made as the result of an unlawful bargain between Thomas and the candidate for mayor. He not only knew this, but actively assisted in bringing about the bargain. To understand the unlawfulness, if not the criminality, of the transaction, required no refined or delicate sensibilities. Every person who has grown up and been trained under the accepted ethical viewsof our social organization, instantly would recognize that such a transaction was plainly wrong. Fetzer reasonably could not have believed that Thomas was authorized to commit an obviously unethical or unlawful act. In the circumstances Fetzer was put upon inquiry to ascertain Thomas' authority. Having neglected to do so, Fetzer acted at his peril. The general rule is that when a

person dealing with an officer of a corporation has knowledge of facts sufficient to excite his suspicion, or raise a doubt in his mind, as to the authority of the officer, it is his duty to inquire as to the nature and extent of the authority. 14A Corpus Juris, pp. 351, 352; 3 Fletcher on Corporations, section 1928, p. 3120.

It cannot be argued properly that the cross complainant has received the benefits of the contribution, with acquiescence and approval, and is, therefore, estopped to contend that the contribution was ultra vires, as there is no evidence that the tracks of the General Electric Railway were removed.

In order to show that two contributions of $15,000 and $60,000 consistently could have been made by the cross complainant, counsel for Fetzer states and discusses at length evidence which he interprets as indicating the urgent necessity, for the cross complainant, that the tracks of the General Electric Railway should be removed, and argues as follows: "We repeat that whether it [the $15,000 contribution] was an additional contribution, or whether Thomas' statement was a statement of expediency,** we need not decide. Either suggestion we submit to be a sufficient answer to the contention of appellant's counsel that Delano's testimony about the $15,000 voucher in some way overturns the force of the testimony of Fetzer and Peabody, the admission of Thomas, and the unanswerable state of mind of all the officials of the Western Indiana Road," [the cross complainant.]

We have previously stated that in our opinion the $15,000 contribution was in fact made, and that the alleged $60,000 contribution was not made. But assuming for the sake of argument that the $60,000 contribution was made, we do not think that the account of Fetzer should be credited with that amount, as Fetzer,

according to his own testimony, actively assisted Thomas in using unlawfully the funds of the cross complainant which were devoted to the specific purpose of purchasing real estate for the cross complainant.

In order to render probable the testimony of Fetzer that the contribution of $60,000 was made, counsel for Fetzer cites instances where Thomas directed officials of the cross complainant to make political contributions and to charge the amounts to such accounts as "track elevation" and "legal expenses."

We recognize the fact that the cross complainant did make political contributions in the way that counsel has stated. But we are not rejecting Fetzer's testimony in regard to the alleged contribution of $60,000 on the improbability that the cross complainant would make political contributions. The reason that we have not given credence to his testimony is that the amount of the alleged contribution was not corroborated by Peabody, and the alleged contribution is inconsistent with the contribution of $15,000.

In considering the evidence in regard to the purchases in question it must be borne in mind that under the rules of law, since the evidence shows that Fetzer was an agent of the cross-complainant, and that as such agent he had made a false report which required explanation, the burden of proof was on him to establish by a preponderance of the evidence the credit claimed by him; and that in such circumstances every doubt should be resolved against him. Furthermore, the alleged contribution of $60,000 was made in a different way materially from the other political contributions referred to by counsel for Fetzer. Those contributions were made from the general funds of the cross complainant with knowledge or acquiescence of the directors, and

charged to certain accounts. They were not made as the alleged $60,000 contribution was made, without knowledge or acquiescence of the directors from funds specifically devoted to the purchase of real estate for the complainant; and they were not reported to the cross complainant, as Fetzer reported the alleged $60,000 contribution, by being concealed in false reports of purchases of real estate for the cross complainant.

It follows from the views we have expressed in regard to the purchases under discussion, namely, the Jennings-Barry purchases, that Fetzer should not be credited with the alleged political contribution of $60,000, and should not be allowed any commissions; and that he should pay to the cross complainant the sum of $94,650, which is the total deficit in these purchases.

It is contended by the cross complainant that in the purchases of four groups of properties designated, respectively, as Landers, Minton, Loesch and Flemming, there are deficits aggregating $92,310, for which Fetzer has not accounted. The purchase of these properties was directly related to the purchase of the property known as the Corkery Coal Yards, owned by Mrs. Mary A. Corkery. Each of the Landers, Minton, Loesch and Flemming purchases was reported to the cross complainant by Fetzer as a separate purchase in which Landers, Minton, Loesch and Flemming were the respective vendors, and in which their receipts were returned by Fetzer as those of real vendors. The fact is that Landers, Minton, Loesch and Flemming were dummies, who each represented several vendors. In the Landers purchase there were five vendors; in the Minton five; in the Loesch six; and in the Flemming eight. It is a fact that neither Landers, Minton, Loesch nor Flemming had purchased property from any of the vendors that they purported to represent, but that Fetzer in collusion with Francis S. Peabody,

who pretended to be the real vendor, had made all of the purchases from the real owners of the properties. The only reasonable inference why Fetzer did not report Peabody as the vendor is that such a report would have shown that the respective amounts for which Landers, Minton, Loesch and Flemming receipted ostensibly as the real vendors, had not been paid in fact to the actual vendors. According to Peabody's testimony he was the vendor. He testified that he "negotiated for them, bought them and paid for them;" that his "negotiations were with the owners." He testified further, "I can recall no one with whom I myself negotiated. I think I was with the Austins [John F. Austin and Michael Austin, brothers of Mrs. Corkery] or McCormick in some of the houses of the vendors at the south end, but I cannot recall the names. I do recall how payment was made for those lots. At the time I kept books, but they were destroyed quite a long time ago." Peabody also testified that in making the sales Fetzer was representing him; that Fetzer was not representing the Chicago and Western Indiana Railroad Company [the cross complainant] in the sale of the property for him; that Fetzer was his agent in the matter; that he paid Fetzer $15,000 or $20,000 for making the sales.

Fetzer testified that he was not the agent of Peabody, but that he was the agent of the cross complainant. As quoted from the abstract Fetzer's testimony was as follows: "I didn't understand I was representing Peabody. Peabody certainly knew that I was representing the Western Indiana, [the cross complainant]. I went to him and told him the situation as it really was. That didn't mean that I told him that Thomas had instructed me to buy any of these lots near the Western Indiana. ** I don't remember that I explained what I had to do with the deal. I let him infer that. I am giving the substance of what I said. I didn't tell him in words that the Railroad company had employed me for it to

buy in these lots. I didn't tell him in substance, but I should think that he would infer that from what I told him." Fetzer testified further: "In a general way I should say Peabody was not putting a dollar of his money into this property. I furnished him the earnest money, and then I furnished him the entire consideration for the property." There are checks in evidence tending to corroborate this testimony of Fetzer; and the evidence shows that the bills for the guaranty policies of the titles of the properties were paid by the cross complainant, and not by Peabody. The evidence shows that in some instances Fetzer made payments directly to the vendors instead of making them through Peabody. The evidence also shows that Fetzer advanced $15,000 of the money of the cross complainant to Peabody before he, Fetzer, was certain that the cross complainant would buy the property. In his testimony Fetzer stated that he "furnished earnest money to Peabody to go in and make these purchases, with the understanding that the Railroad company [the cross complainant] might not take the property in the end."

In this state of the evidence we do not think that Peabody should be considered as a bona fide vendor of the property to the cross complainant. The part that he took in the purchase of these properties, which was a rather complicated transaction, was an unusual one. His relation to the cross complainant and to Fetzer, and Fetzer's relation to the cross complainant will more clearly appear from the detailed statement of the evidence which we will now make. The Peabody Coal Company had a lease and Peabody had an option on the Corkery Coal Yards, for which Peabody was anxious to negotiate a sale to the cross complainant. According to Fetzer's testimony, Thomas told Fetzer that the cross complainant did not want to buy the Corkery Coal Yards, but that the cross complainant would buy property outside of the Corkery Coal Yards. The properties involved in the purchases under discussion, namely, the purchases

known as the Landers, Minton, Loesch and Flemming purchases were so situated with reference to the Corkery Coal Yards that if the cross complainant bought the former properties, those properties practically would be useless unless the Corkery Coal Yards were also purchased.

Peabody and Fetzer had known each other intimately, both socially and in a business way, for many years. Fetzer attended to all of Peabody's real estate business. An instance of the close relations of Fetzer and Peabody has been shown by Fetzer's testimony in regard to the alleged contribution of $60,000 to the Busse campaign fund. Fetzer and Peabody devised a plan, which was acquiesced in by Thomas, whereby both the Landers, Minton, Loesch and Flemming properties, and the Corkery Coal Yards were purchased by the cross complainant as grossly excessive prices. Fetzer's testimony in this respect, which we will quote from the abstract, was as follows:

"Peabody, I think it was in December, 1906, sent for me and said he owned the Corkery Coal Yards, that he controlled that, had it on a long time lease, with an option to buy, and he would like to have me sell it to the Chicago & Western Indiana [the cross complainant], that they were going to purchase all the way down to 29th street. I told him that my dealings both with the Western Indiana [the cross complainant] and the Wabash in that had closed, that I had had nothing at all since August or September, when my purchases were closed; that I had bought nothing for the Western Indiana in that locality, all I had purchased up to that time was the three yards; that the Wabash purchases had been entirely closed, but that I would see Thomas if he wanted me to. He said, 'Yes, and they are ready to buy.' I went down to see Thomas and he told me they were not ready to buy, were not in the market, and were not going to purchase any more in that locality. He was very frank, said it would probably be some time before they bought anything in that locality. I came back and reported it to Peabody, and I guess

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from that time on I saw Thomas on an average of possibly once a week, hardly think that often, once in ten days, at Peabody's request and earnest solicitation. Every time Thomas assured me that the company had no idea of buying it. So when I was sent for to buy the property it was somewhat of a surprise; as I remember it now Thomas said that the directors had taken it up and decided to go ahead at this time, but that they would not buy the Keller Coal Yard, the Nafer & Son Coal Yard, nor the Corkery Coal Yard, but that they would purchase as much of the property as they could get for a reasonable price but for the present I should keep north of 26th street. That was in the conversation on 30th of January. I don't remember that I told Peabody then what Thomas said, but a few days after Thomas asked me if I had done anything between 26th and 29th streets, outside of the coal yards. I told him I had not, and that Peabody had the Austins in his employ down there, and they lived there, and I thought the best way, if we could get Peabody to do it, was to get a price at which he would purchase this property, and deliver it to us; if we did not, he would get in there, and it would cost us more money than I believed we could purchase for in this way. Thomas said the price would have to be satisfactory to him anyway before anything could be done. And he said, 'You see what you can do, if you think that is the best way to do.' I told him I did think it was the best way to do because if he went in back of Peabody I thought it would cost us more money than to go in openly. I then went to Peabody and showed him how if the Western Indiana bought this outside of the coal yard that they would have to either make some deal in exchange for this land and the coal yard, taking that part of the coal yard near the tracks, and giving an equal area further out, and including the trackage, or if they would be bound to buy it, and be more to his interest: that I could

[illegible] and be more to its interest, that I could

not buy it unless the prices were satisfactory; that if he could get prices on this property, and name them to me, that I could get Thomas to approve. I could get the authorization to purchase this property, outside of the Corkery Coal Yard, being all of the property running out to Canal street, between Western Indiana and Canal street. I told him I would have to have it in blocks, that I was buying north of 26th street, and didn't want to go any further south; in other words, we didn't want any property between the two places we had not bought, that would hold us up, we wanted to be where we could stop at any time, and for him to get me a proposition, of Block 1, first. I mean by Block 1, the first block south of 26th street. Witness proceeds to indicate on map. I think the Roth estate owned lots in this block, and in the next one, so that in getting price I really got the price on Block 1 and Block 6 practically at the same time. The prices were submitted to Thomas, discussed and approved by him, and purchases made as fast as he could get them up. Peabody had options or a contract, I don't remember, and he seemed to know the prices when I first went to see him, what he could deliver them for. When I went to see Peabody it was my honest judgment that I could make a better bargain for the Western Indiana than otherwise, by buying through him. As I explained to Peabody, it was to his interest to sell property to the Western Indiana [the cross complainant] and that his interest would suggest that in order to make a sale to make the price as low as he could, because he undoubtedly had the profit in the Corkery Coal Yard which he was exceedingly anxious, and trying to sell to the Western Indiana [the cross complainant]. I don't think I met either John or Mike Austin in this connection, until after these sales were entirely completed. I never met McCormick. I do not remember prices Peabody quoted me, but Peabody asked me, when I asked him to name prices in there, what

commissions I wanted, and I told him I wanted 5 per cent commission for selling it to the Western Indiana Road [the cross complainant], that I got no commission from them; and he named the price which was the price at which I reported it to the Western Indiana [the cross complainant.] Thomas usually complained at first about the prices. It was a very low price. He approved of them before we purchased them. In a number of cases pieces were not always taken at the price that Peabody asked. Peabody named a price afterwards on Block 7, and in doing it the way Thomas insisted, and go down a block at a time, when Peabody got some lots in Block 12, he named a price, and Thomas said he didn't think he would take anything in Block 12 for the present; and Peabody named me a lower price if I could get them accepted by Thomas, and I did. I think the prices asked by Peabody in the blocks north of that were accepted. I made payment in checks for substantial amounts, as he would need them, in closing up with the Chicago Title & Trust Company. I have the checks."

Fetzer testified further that he said to Peabody, "Now if you can buy this cheap enough, Thomas will take them, and if he takes them, it seems to me it makes it almost a cinch that he will have to have that Corkery Yard, and it is to your interest to make the price pretty cheap; and he said 'I will see what I can do right away, John,' and he made me the prices, and I reported the prices to Thomas." Continuing his testimony Fetzer stated: "I thought the railroad would make money by doing it this way rather than to go in and try to undermine Peabody with the facilities he had, knowing the instant anybody inquired. I mean undermine Peabody in his business, that is all, buying railroad property. I don't think what I did was to permit Peabody to undermine the railroad. I thought that Peabody was in a position to buy cheaper than outsider, that he could afford to make it practically without profit in order to get the railroad to invest this amount of money back behind the Corkery

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Yard as the Corkery Yard would be between their property and their tracks, if he wanted to sell the Corkery Yard, which he had been telling me he did, to the railroad [the cross complainant]. ** He could have well afforded to turn it in at any price, at the price that he paid, and I thought he did practically at the time. *** From what has been brought out, he made more money than I had any idea he did. I didn't take any pains to find out how much money he was making at the expense of the Railroad company [the cross complainant] because I knew the value of the property, what it was costing in a general way, and I got the approval of Thomas before I ordered any blocks purchased. The important fact was what the vendor was willing to pay, not what Peabody was willing to turn it in at. If I could have got at the vendor without Peabody, but I didn't feel I could get my agent into these blocks and make the purchases, as a real estate man, instead of having Peabody as a middleman. ** The purchase of the lots would equally have enhanced the price at which the Corkery property might be sold to the railroad [the cross complainant]. But Peabody would have felt different toward the railroad. I think he would have made a larger rake-off if we had done it in the regular way than in the way we did. ** Thomas when he made me my first advance on this deal, didn't understand that I was to furnish Peabody with earnest money to make those purchases. I took the chance myself."

In the transaction in question, namely, the purchases known as Landers, Minton, Loesch and Flemming purchases we are of the opinion that Fetzer and Peabody perpetrated a fraud on cross complainant. We think that Fetzer was the agent of the cross complainant and not the agent of Peabody; that Peabody was not the real vendor of the property, but merely acted in concert with Fetzer to accomplish the fraud. In our view Fetzer was guilty of disloyalty to the cross

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complainant, and betrayed the interests of the cross complainant. Both Peabody and Fetzer shared in the $92,310, which was the amount that the cross complainant paid in excess of the actual amount disbursed by Fetzer. The evidence shows that Fetzer received at least $15,000, under the guise of commissions. Apparently Peabody received the remainder. Fetzer testified that the $15,000 which he received as commissions was divided between him, Peters and Kappes.

In computing the amount of the deficit in the purchases in question the cross complainant, in a number of instances, showed by the testimony of the real vendors the amounts that they actually received; and where the real vendors did not testify the amounts were estimated by taking the price per square foot of property of the same general character and value. Neither Fetzer nor Peabody testified that any of the amounts were incorrect; nor did they offer any evidence as to what the real vendors actually received. In view of the fraud perpetrated against the cross complainant by Fetzer and Peabody, the cross complainant was entitled to the properties at their fair cash market value. As the evidence of the cross complainant in respect of the value of the properties was not objected to or disputed by Fetzer, we are of the opinion that the evidence may stand as the prima facie value of the properties. We think that Fetzer should be ordered to pay to the complainant the sum of $92,310.

In the purchase of the Corkery Coal Yards, Fetzer reported to the cross complainant thatthe price paid for the property was $750,000, when in fact the actual price paid was $600,000. The difference of $150,000 was divided between Fetzer and Peabody - Fetzer receiving $50,000 and Peabody $100,000. The property was owned by Mrs. Mary A. Corkery. In this transaction Fetzer pretended that Joseph B. Flemming, a clerk in his office, who was used as a dummy

by Fetzer, sold the property to the cross complainant. The deed from Mrs. Corkery was made to Flemming, and Flemming executed a mortgage on the property to Mrs. Corkery. The evidence showed receipts of Mrs. Corkery for $250,000 in bonds of the cross complainant, and $200,000 in cash; the evidence also showed a receipt of the Peabody Coal Company for $100,000 in bonds for the cancellation of a lease which that company held on the property; and the evidence further showed that a mortgage of $200,000 was assumed by the cross complainant, making a total of $750,000 alleged to have been paid for the Corkery Coal Yards. Fetzer admitted that he never reported the receipts of Mrs. Corkery to the cross complainant. He testified that he gave them to Flemming. The auditor of the cross complainant, when he learned that Flemming was Fetzer's clerk, refused to accept Flemming's receipts as receipts of the real vendor of the property; and Fetzer then gave Mrs. Corkery's receipts to Kappes and Kappes delivered them to the auditor. This part of the transaction will be explained more fully later. It is an undisputed fact, however, that instead of receiving $250,000 in bonds and $200,000 in cash, Mrs. Corkery received only $100,000 in bonds and $200,000 in cash. In respect of these false receipts Fetzer testified as follows: "As far as the railroad [the cross complainant] was concerned she [Mrs. Corkery] got the 250 bonds represented by the receipt for $250,000 in bonds, which I say she signed. So far as I was concerned she did not." Although Fetzer testified on the trial that Mrs. Corkery only received $100,000 in bonds and $200,000 in cash, he alleged in his amended answer to the cross bill of the cross complainant that Mrs. Corkery received $500,000, including a mortgage of $200,000. It was necessary, therefore, on the trial for Fetzer to account for $150,000. He attempted to account for it by testifying that as part of the transaction the cross complainant paid $150,000 to

Peabody for an option held by Peabody on the Corkery Coal yards. No mention, however, was made by Fetzer of such a payment in his report to the cross complainant. It is obvious that if such a payment was made, Fetzer concealed the fact by producing receipts of Mrs. Corkery which falsely recited that she had received $150,000 more than she actually did receive. But if the payment of $150,000 to Peabody for his option was really made, there is no valid reason why Fetzer should cover up the payment by falsely including in Mrs. Corkery's receipts $150,000 more than she received. Peabody denied that he received $150,000 from the cross complainant for his option on the Corkery Coal Yards. He stated that the cross complainant paid the Peabody Coal Company $250,000 for its lease on the Corkery Coal Yards. Yet there is in evidence Peabody's personal receipt to the cross complainant for $150,000 in bonds of the cross complainant for his option on the Corkery Coal Yards; and also a receipt of the Peabody Coal Company to the cross complainant for $100,000 in bonds of the cross complainant for the cancellation of the lease of the Peabody Coal Company on the Corkery Coal Yards. Fetzer never delivered to the cross complainant the receipt of Peabody for the $150,000 for the option. On the trial Peabody's attention was called to the receipt of $100,000 for the cancellation of the lease, but he stated that he was unable to explain why the receipt recited $100,000 as the consideration for the cancellation of the lease, if $250,000 represented the value of the lease.

In our view of the evidence the value of the lease was not estimated at $250,000, but at $100,000. Fetzer testified that Peabody estimated the value of the unexpired term of the lease on the rental value of the property and on that basis fixed the value of the lease at $100,000. In a letter to Thomas, Fetzer

stated that he "hoped to" get the lease for $100,000. Fetzer's testimony and letter, which are corroborated by the receipt of the Peabody Coal Company for $100,000 for the cancellation of the lease, are convincing that the value of the lease was $100,000 and not $250,000, as claimed by Peabody. It follows then that the $150,000 deficit which represents the difference between $750,000, which Fetzer reported as the cost of the Corkery Coal Yards, and $600,000, the amount which is shown by the evidence to have been actually paid, cannot be accounted for on the theory that $250,000 was paid for the lease. Fetzer does not so contend. Fetzer does not adopt Peabody's testimony that the value of the lease was $250,000, but attempts to account for the $150,000 by maintaining that $150,000 was paid for the option of Peabody on the Corkery Coal yards.

But the evidence shows that the option of Peabody was valueless. Peabody obviously recognized that the option was worth nothing when he testified that "the lease of the Peabody Coal Company was what we got $250,000 for." The option was for $650,000; and the fact is undisputed that Mrs. Corkery received only $500,000, and never at any time asked more than $500,000 for the Corkery Coal Yards. Furthermore, the option had expired at the time that Thomas made his report to the board of directors of the cross complainant that negotiations had been concluded in respect of the purchase of the Corkery Coal Yards.

The inference is unavoidable that Fetzer falsified his report to the amount of $150,000. According to Fetzer's testimony he received $50,000 of this amount and Peabody $100,000.

Thomas and Kappes assisted Fetzer in accomplishing this fraud on the cross complainant. Kappes was an assistant of Thomas. Kappes had a desk in Thomas' room before he was given a separate room. According to Kappes' testimony "at the very

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beginning of my relations with the company Mr. Thomas instructed me to report to him and to him only and to furnish no information to any person or officer or otherwise, without his express permission." Before the purchase of the Corkery Coal Yards, Fetzer wrote a letter to Thomas in which he stated: "Now the Peabody Coal Company has an actual cash investment for their recent improvements of $58,300, and Mrs. Corkery's home could not be built for less than $20,000. Peabody's lease is for 18 years and I hope to get it for $100,000, which is a small profit. Peabody's option for purchase is for $650,000, or counting nothing for improvements is less than $3.50 per square foot, and if the whole could be gotten for $750,000 and figure nothing for the improvements it is less than $4.00 per square foot and you cannot pick up and join the separate pieces together in this vicinity for less than $4.00 per square foot."

The lease did not have 15 years to run but only approximately 7 years. We have shown that the option for $650,000 was valueless; that Mrs. Corkery's price was never more than $500,000.

In a report to the board of directors of the cross complainant, Thomas stated that "the Road [the cross complainant] through the agency employed by the Wabash Company, Messrs. Fetzer, Peters and Company, continued to make purchases as rapidly as possible ** and that negotiations had been concluded with the Peabody Coal Company and the 'Corkery Estate'"; that the Peabody Coal Company had a lease on the property for 15 years with an option to purchase for $650,000 within thw two years and that the price finally agreed on for the property, including the cancellation of the lease of the Peabody Coal Company, was $750,000.

It will be observed that Thomas repeats Fetzer's misstatement as to the length of the unexpired term of the lease, and

also pretends that the worthless option had a value of $650,000. He further incorrectly states that the option covered a period of two years, when in fact the option had expired when the report was made.

The report of Thomas excludes the idea that Thomas was treating Fetzer as the agent of Peabody, or that the Corkery Coal Yards were purchased directly from Fetzer. If Thomas understood that the purchase of the Corkery Coal Yards was from Peabody through Fetzer as Peabody's agent, there was no possible reason for stating, as he did, that negotiations had been concluded with "the Corkery Estate;" and if Thomas was making the purchase directly from Fetzer there is no explanation as to why Thomas referred to Fetzer, Peters and Company as the agency through which the cross complainant was making the purchase.

In his false accounting for the purchase of the Corkery Coal Yards Fetzer returned to Thomas the receipt of Flemming for $50,000 cash and $500,000 as proof of the expenditure of the amount of $550,000, which Fetzer had received from the cross complainant for the purchase of the property. Thomas turned these receipts over to Kappes and Kappes in turn gave them to Michael J. Murphy, the treasurer of the cross complainant. In respect of Flemming's receipts, Murphy testified as follows: "By inquiring of Mr. Kappes I learned that Mr. Flemming was employed in Mr. Fetzer's office. I told Mr. Kappes that I was not satisfied with Mr. Fetzer's receipt or Joseph B. Flemming's receipt as showing the disposition of the money, and I would have to have the seller's receipt." Murphy testified that he called the attention of Michael J. Clark, the auditor of the cross complainant, to the matter of the receipts. Clark wrote Kappes as follows: "The Treasurer has no receipts from the sellers of this property on file. As you know this company

requires receipts from the sellers, or the cancelled checks covering the disbursements." Kappes forwarded Clark's letter to Fetzer with the following notation on the letter: "Mr. Fetzer: Please note and advise with return of this letter." Fetzer answered as follows: "Referring to Mr. Clark's letter of the 11th inst., Mr. Flemming is the man who sold that land and you have his receipt. This had to be done in order to get the mortgage placed on the land. I will be glad to show the expenditures by Mr. Flemming to Mr. Clark or his representative at any time but these belong to Mr. Flemming and are his only protection."

Murphy told Kappes that he would not credit Fetzer's account with anything less than original receipts. Fetzer then turned over to Kappes typewritten copies of purported original receipts held by Flemming. Murphy told Kappes "a typewritten copy of a receipt was of no value" and that he, Murphy, "could not credit Fetzer's account on such evidence." Fetzer finally turned over to Kappes the two false receipts of Mrs. Gerkery for $350,000 in bonds and $200,000 in cash, and also the receipt of the Peabody Coal Company, which recited that the consideration for the cancellation of that company's lease was $100,000. These receipts were accepted by the auditor and stood as Fetzer's report until the true facts were disclosed on the trial.

The evidence shows that Thomas and Kappes both knew when the first purchases of properties were made by Fetzer under his original agreement with the cross complainant, that the auditor of the cross complainant required the receipts of the "original sellers" of the properties. Kappes testified that he "did not understand that 'original sellers' meant Fetzer. Kappes testified further that in a conference with Thomas in connection with purchases "at Hayford between West 12th and 22nd streets," South Chicago, he told Thomas that the receipts of the original sellers

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could not be obtained according to "the conditions under which these purchases were being made;" and that Thomas said, "I understand that, but satisfy the auditor if you can;" that Thomas did not say why he should satisfy the auditor "as to what the original sellers obtained;" that Thomas just wanted him, Kappes, "to satisfy the auditor's office in any way that he could;" that he, Kappes, called Thomas' "attention to the fact that Mr. Fetzer was the real vendor." Kappes testified further as follows: "I told Mr. Thomas frequently that the reason I couldn't get receipts from the original sellers was because I was buying for Fetzer. He told me to do the best I could, talk to Fetzer about it, write some letters that would straighten out the matter - anything that would keep the auditor quiet, because there were expenditures being made which he did not care to publish. I did not know personally of such expenditures. It was pretty much in the air. That is the best I can do by way of answer. ** I knew that the prices, particularly in the purchases I handled, were not the prices which I had paid, that if larger sums were being paid ostensibly to Fetzer, it was not because he was vendor and making a profit, but because they wanted to hide the use of moneys of the Western Indiana [the cross complainant]. That was all included. I do not know what he was to do with it after he got it. I do not know what the purpose was in making the books show larger amounts had been paid than had actually been paid. ** The Railroad Company [the cross complainant] did not know that I was paid, nor did they pay me any commissions. I think my commissions had a bearing on the amount reported as the purchase price. I did not report to the Railroad company [the cross complainant] that property had been bought at a certain price, out of which I had received a certain commission."

It is contended on behalf of Fetzer that in the purchase

of the Corkery Coal Yards Fetzer was not the agent of the cross complainant. Peabody testified that Fetzer was his agent and that he told Fetzer that if he, Fetzer, would sell the property for him for $750,000, he would give him, Fetzer, $50,000.

In determining the question of agency the purchase of the Corkery Coal Yards must be considered in connection with the purchases known as Landers, Minton, Loesch and Flemming. These latter purchases were made for the purpose of forcing the cross complainant to buy the Corkery Coal Yards. As we have previously stated, we are of the opinion that under the original agreement with the cross complainant, Fetzer was the agent of the cross complainant in all of the purchases of the properties that he made for the cross complainant; that in attempting to change that agreement Thomas acted without authority of the board of directors; and that the board of directors did not have any knowledge that Fetzer was acting otherwise than as agent for the cross complainant. There are specific facts, however, in regard to the purchase of the Corkery Coal Yards which indicate that Fetzer was acting as agent. The purchase money was not paid to Fetzer as an independent vender, or as an agent of Peabody, but was given to Fetzer on his receipt to be disbursed by Fetzer for the cross complainant. The bill for the guaranty policy of the title of the property was paid by the cross complainant and not by Fetzer or Peabody. Furthermore, Fetzer made a report of the purchase of the property to the cross complainant and submitted receipts to the auditor of the cross complainant for the approval of the auditor. There is also another fact which tends to negative the idea that Fetzer was Peabody's agent, or at least to raise a doubt as to such an agency, and that is the testimony of Fetzer that Peabody said that he "couldn't raise $150,000 and take bonds;" that if he, Fetzer, could raise $150,000, he, Peabody, thought the deal

would go through; and that he, Fetzer, said he would see if he could, and agreed to raise $150,000 and take bonds at par. Fetzer further testified as follows: "In connection with the Corkery transaction I borrowed $100,000 in one item, from myself as receiver of the Milwaukee Avenue State Bank." We make no comment on the ethics involved in this use of trust funds by Fetzer. But the fact that he told Peabody that he would raise $150,000 and did obtain $100,000, can hardly be reconciled with the theory that Fetzer was Peabody's agent. Another circumstance which indicates that both Fetzer and Thomas knew that Fetzer was acting as agent for the cross complainant is the following statement in Fetzer's letter to Thomas which we have previously quoted: "Peabody's lease is for 15 years and I hope to get it for $100,000 which is a small profit." The only reasonable construction that may be placed on this statement is that Fetzer was acting for the cross complainant, and hoped to get Peabody's lease for the cross complainant. The statement will not admit of the absurd interpretation that Fetzer, as Peabody's agent, hoped to get Peabody's lease for Peabody.

We have pointed out heretofore the fact that the report of Thomas to the board of directors in regard to the purchase of the Corkery Coal Yards excludes the idea that Thomas considered Fetzer as the agent of the cross complainant when the report states the cross complainant was making purchases through the agency of Fetzer, Peters and Company.

Although we have discussed the question of agency as if the transaction was free from fraud, and have expressed the opinion that there was no agency, yet we think that the real question to be determined on the evidence is one of conspiracy. In this respect counsel for Fetzer takes the following position: "It is, however, sufficient for the purposes of this statement to point out that the

claim that the appellant was over-reached in this case [the purchase of the Corkery Coal Yards] again depends as to all the other like claims, upon the assumption that Mr. Fetzer and Mr. Thomas were conspirators striving to rob the appellant company, and with that assumption disproved it becomes evident that the Railroad company [the cross complainant] and Mr. Thomas, having had notice of Fetzer's relations to the Corkery property and making the proposition of sale in the form of a direct sale and not of an agency, dealt with Mr. Fetzer with its eyes open."

Our answer to this argument is that we are of the opinion that Fetzer and Thomas were conspirators; and that Fetzer was the agent of the cross complainant and guilty of disloyalty even on the theory that there was no conspiracy. We are further of the opinion that Peabody and Kappes were co-conspirators with Fetzer and Thomas. In this view it follows that Fetzer is under the legal duty to pay to the cross complainant the sum of $150,000.

In connection with the purchase of the Corkery Coal Yards there was a transaction referred to as the Cobb transaction, by means of which the cross complainant was defrauded of $40,000 by Fetzer and Thomas under the pretense that the money was to be used by Thomas for "railroad purposes." The $40,000 was paid by the cross complainant to Edgar S. Cobb for the purchase of four lots, which were purported to be owned by Cobb. It is undisputed that Cobb, who was a clerk in Fetzer's office, was not a bona fide owner of the lots, and that the transaction was devised merely for the purpose of concealing the payment of the $40,000 to Thomas. According to Fetzer's testimony the scheme employed was as follows: In the purchase of the Corkery Coal Yards by the cross complainant, Flemming, who as we have previously stated, was a dummy and a clerk in Fetzer's office, did not convey to the cross complainant all

of the lots which had been conveyed to him by Mrs. Corkery, and for which the cross complainant had paid, but withheld four lots. These four lots Flemming conveyed to Cobb and Cobb in turn conveyed them to the cross complainant for $40,000. The checks for the $40,000 were paid to Cobb by the cross complainant, and were endorsed by Cobb to Fetzer, who obtained the $40,000 and paid $30,000 to Thomas in currency and $10,000 by check to Henley.

As a consequence of the fraudulent Cobb transaction the cross complainant paid for the four lots twice, as they had already been paid for in the purchase of the Corkery Coal Yards. Adding the $40,000 paid for the four lots to the $750,000 which Fetzer falsely reported as having been paid in the purchase of the Corkery Coal Yards, the total amount paid by the cross complainant for the Corkery Coal Yards was $790,000. As the actual price of the Corkery Coal Yards was $600,000, the cross complainant paid $190,000 in excess of the price. Furthermore, the cross complainant paid for a guaranty policy of title on the four lots just as if the transaction had been a bona fide purchase from Cobb.

The testimony of Fetzer in respect of the Cobb transaction, as the testimony appears in the abstract, is as follows:

"Thomas said that the matter the railroad had up required more money than he anticipated when he started in on it, and wanted to know if it couldn't be taken care of in the Corkery deal. I said I didn't see how it could, not one cent. There were options in it and it would bring Peabody in it and Mrs. Corkery and I did not see how it could be done at all. He said we will fix up that later, 'but I will have to have some more money.' I said, 'Well, I will see. We will talk that over.' He didn't say anything more about it that day. When I come to see Mrs. Corkery's title, four of the lots had come in and there was a title coming from the railroad in another title, and I told Thomas that I could report them as a

separate transaction entirely, and I said the valuation of the lots is about $40,000, and you can report it at $40,000, and that will take care of $40,000 of the money I advanced you. He said, 'I must have that in addition to what you have already advanced me. The railroad [the cross complainant] has spent the money, or has agreed to spend it, and the only way to charge it is to charge it to real estate account; and you are doing the work for us; it must go through the real estate account.' I said, 'All right.' I reported the four lots that were in the Corkery deal separately as another transaction at $40,000; and $30,000 was given to Thomas; and $10,000 to Henley at Thomas' direction. That is the $40,000 referred to as the Cobb purchase by him. I already had $60,000 paid out, and no vouchers for it. I had been carrying it for sometime, so that if anything happened to Thomas I would have no proof, so when the $30,000 was added to it, I was to get credit for $40,000 on the books of the company at once, but I wanted to know if he paid it. So I took Cobb with me. I think Cobb got the $30,000 as a matter of fact. Anyway we talked it over in my office, and in the presence of Cobb I put it in an envelope and went into Thomas' office and came out and showed him that I didn't have it. That was the only proof I could have. Cobb went with me to Thomas' door. Thomas told me to give $10,000 to Henley in currency. Cross complainant's exhibit 246 is the $30,000 check on which Cobb got the $30,000. The currency obtained on the $10,000 check was held until Henley called at my office for it, and when he called I gave him the check and he says 'I was to have this in currency.' I said, 'I guess you are mistaken about that, you can take my check.' 'No,' he said, 'the understanding was I was to have currency, and Thomas said I was to have it.' I said, 'You better take this matter up with Thomas.' He said he would call Thomas up. I knew Thomas was not in his office,

so I agreed that he should call him up. He called Thomas and Thomas was not in. He said, 'all right, it doesn't make any difference;' so he took the check, and I redeposited the $10,000 cash to my credit in the bank. *** I received no part of it, or benefit from it, or from the $30,000 given to Thomas."

We are of the opinion, as heretofore indicated, that if the $40,000 was given to Thomas at all, it was not given to him for "railroad purposes," but was given to him collusively by Fetzer for Thomas' own personal use. That Fetzer doubted that the $40,000 was to be used for "railroad purposes" is shown by the fact that when he gave the money to Thomas he took Cobb with him to the door of Thomas' office. The only permissible inference from this circumstance is that Fetzer did not believe that Thomas wanted the money for "railroad purposes."

In the view we have taken of the Cobb transaction it follows that Fetzer should pay to the cross complainant the sum of $40,000.

In the purchase of the properties known as the Keller-Hafer Coal Yards, there was a deficit of $135,000 between the amount reported by Fetzer and the amount actually paid the vendors. This deficit was admitted by Fetzer. He attempted to account for it by testifying that he gave $15,000 to Thomas and Henley for "railroad purposes;" that he retained $65,000 himself to cover amounts which he had previously advanced to Thomas and Henley; that he also retained $25,000 for "financing" the Keller-Hafer transaction; and that he further retained $30,000 for his commissions, out of which $30,000 he gave Kappes $11,000 in bonds.

The properties were reported to the cross complainant by Fetzer as a single purchase, although the properties were separate and distinct, and were owned by different owners, Theodore C. Keller owning one of the coal yards and Henry Hafer the other.

Fetzer reported the price of the properties at $600,000, of which sum $275,000 was in cash and $325,000 in notes secured by mortgages. The deeds to the properties were taken in the name of Fetzer's partner, Peters, who executed mortgages in the total amount of $325,000. Subsequently the cross complainant delivered its bonds to Fetzer with which to take up the mortgages. Fetzer returned to the cross complainant a purported receipt from Keller for $200,000 in cash, and a receipt of Hafer for $75,000 in cash. Keller testified that he never signed the receipt for $200,000 in cash, and never received $200,000 in cash; that he received only $50,000 in cash and $275,000 in bonds of the cross complainant. Hafer testified that he received $75,000 in cash and $65,000 in bonds of the cross complainant. On the trial Fetzer did not deny these amounts testified to by Keller and Hafer. On the undisputed evidence, therefore, Keller and Hafer received in the aggregate $465,000 instead of $600,000, as reported by Fetzer. In addition to the amount paid to Hafer the cross complainant conveyed to Hafer, as a further consideration, four lots purchased from Keller adjoining the land conveyed by Hafer to the cross complainant, and equal in area to the land conveyed to the cross complainant by Hafer; and also as a further consideration to Hafer the cross complainant entered into a contract with Hafer giving Hafer trackage facilities.

We are of the opinion that the evidence in regard to the purchase of the Keller-Hafer Coal Yards not only shows a deficit of $135,000, which is admitted by Fetzer, and which we will discuss later, but also shows that Fetzer, Thomas, Henley and Kappes collusively induced the cross complainant to purchase the Keller-Hafer Coal Yards at an excessive price.

Keller testified that about a year and a half before the Keller-Hafer purchase, Thomas asked him what he wanted for his

property, and that he told Thomas $250,000; that Thomas said, "Too much," he could not use it; that subsequently Thomas again wanted to know what he would take for his property, and that he, Keller, said $300,000; that Thomas smiled and said he could not pay it; that at a still later date J. B. Brown, a former president of the cross complainant, called on him, Keller, and told him he had come to see him about his, Keller's, property "on behalf of Mr. Fetzer and the Railroad" [the cross complainant]; that Brown told him, Keller, that he, Brown, had told Fetzer or had told Thomas, that they didn't know him, Keller, that they didn't appreciate the business he, Keller, was doing, and what that Yard meant to him; that Brown said to him, Keller, "Now, Theodore, I would accept $325,000 and go and buy a yard somewhere else and end this difficulty and your losses having to go on the team track;" that Brown himself named the sum $325,000; that he, Keller, said to Brown, "Mr. Brown, if they will come in and close this t ing up for $325,000 right away, they can have the property;" that this "was the first time that the sum of $325,000 had ever been named between us;" that his, Keller's, "last offer to Mr. Thomas had been relative to a sale by him [Keller] for $300,000;" that he, Keller, does not remember of dealing with Fetzer before; that after this conversation with Brown, he, Keller, did see Fetzer and did mention the price of $350,000; that Fetzer said, "You offered it to Brown just a short while ago for $325,000." Keller also testified that he might have asked the same price from Brown as he did from Fetzer. The price of $325,000 is the price at which Fetzer purchased the Keller Coal Yards for the cross complainant.

Before the purchase of the Keller-Hafer Coal Yards Fetzer wrote to Thomas on April 12, 1907, as follows:

"The following proposition is made by myself individually and based on the oral agreements had with different parties by

myself, but I am confident I can carry them out. I can purchase the entire premises known as the Keller Coal Properties and the Hafer Coal Properties, being all of the properties between 23rd street and the Catholic Church and the Railroad and Canal Street, - not now owned by the Railroad Company, - for $800,000, of which amount I think I can get along with $200,000 cash and $600,000 in 4% bonds of the Chicago & Western Indiana Railroad Company. This is practically $6 per square foot. This price is not made by the parties themselves,nor could such a low price be obtained from them by anyone, but the price is based upon an exchange of properties with these people and paying cash in addition to the purchase of the properties which I am to exchange. Neither of these men has made any price for the sale of his property but in my negotiations I am able to present to you this proposition as from myself and am satisfied I can carry it out."

Fetzer and Thomas both knew that the statement that "Neither of these men had made a price for the sale of his property" was false. On the same day that Fetzer wrote the letter just above quoted, Henley wrote the following letter to Thomas:

"Replying to your inquiry in regard to the reasonableness of the price at which the property owned by Hafer and Keller had been offered to you. I have gone into this matter thoroughly in the past six months, and the best prices obtainable for the two pieces was $600,000 for the Hafer property and $400,000 for the Keller tract. The last time I talked to Mr. Hafer, he withdrew his property from the market, saying that the profits from his coal business at this location were such that he would not consider any sale. I would strongly recommend the purchase of the two tracts named at $800,000 if the same can be arranged. It is certain that delay in this matter will not lessen the price."

The statement in Henley's letter that $400,000 was the best price obtainable for the Keller Coal Yards was false, as we have shown that Keller never asked a price as high as $400,000; that the highest price that Keller personally ever named was $350,000; that $325,000, the price proposed to him by Brown, was the highest price that was ever submitted to him, and that Keller never named the price of $350,000 until Brown had proposed the price of $325,000. In respect of the $200,000 which Henley mentions Keller testified as follows: "If Henley wrote to Thomas that my price was $400,000, I have no knowledge of where he gained that impression. I don't remember of ever hearing of such a price as $400,000."

The day after the letter of Henley was written, Kappes wrote a long letter to Thomas in which he stated as follows:

"The proposition submitted by Hafer a few weeks ago was for exchange of property by which the Western Indiana Company was to give Hafer property along So. Canal street immediately west of the tracks. To do this would involve crossing 23rd place and 24th street with Hafer's side tracks and he positively refused to entertain a proposition that involved two street crossings. In other words, he declined to consider any property south of 24th street. His proposition was that we give him a strip 125 feet wide extending from the south line of 23rd street to the north line of 24th street and pay him $225,000 in cash and pay for the construction of the trestles and sidetrack. This would necessitate the railroad's buying 125 feet on the south side of 23rd street and 25 feet on the north side of 23rd place from Keller. In addition Hafer demanded the same standing room for cars he now has, and switching rights on the railroad's lead from 26th street. Hafer places the cash value of $600,000 on his present holdings. Hetzer's present proposition is for the outright purchase for

$450,000."

Two days after writing the above letter Kappes again wrote to Thomas as follows:

"In re Keller coal yard, consisting of 273 feet frontage on the south side of 23rd. 173 feet on the north side, various negotiations with Keller have been declined by him. Keller recently obtained an ordinance for elevated switch tracks which would seriously conflict with proposed team tracks. Keller may start suit if connection denied. Mr. Fetzer succeeded in getting proposition from Keller for an outright sale of his yard for $350,000. It seems desirable to acquire Keller property under this proposition."

Kappes' statement that "various negotiations with Keller had been declined" by Keller and that Fetzer had succeeded "in getting a proposition from Keller for an outright sale of his Yard for $350,000" were both false, as we have seen that Keller agreed to accept Brown's proposal of $325,000.

The day after Kappes' letter just above quoted was written, Thomas wrote a letter to Delano, in which the following statements were made: "Hafer wanted $600,000. Fetzer refused. The price was reduced to $450,000, which Fetzer agreed to submit to the company. ** I think we would be justified in paying Mr. Hafer $450,000 for his coal yard and that we would never have cause to regret it." The letter of Thomas was based on Fetzer's letter of April 12, 1907, which we have set out above.

On April 17, 1907, Delano replied to this letter of Thomas and stated: "When it comes to Hafer $450,000 is a pretty stiff price, and yet I believe it would be fully justified if it were not for the money conditions. I guess Hafer would like $450,000 just as much as the next man. We can afford to stand him

off a little, and not be very anxious to give him accommodations in the way of service, side tracks, etc." Thomas made the following notation on Delano's letter: "At a conference March 18, after going over the whole matter thoroughly, Mr. Delano and I agreed Nafer's yard should be purchased." It will be observed that the conference which Thomas mentioned is stated to have taken place on March 18, nearly a month prior to Delano's letter of April 17, which advised Thomas that they could afford to stand Nafer "off a little." Moreover, the Keller-Nafer Coal Yards were not purchased on the terms stated in Fetzer's letter of April 12, 1907, to which we have previously referred, and which was the basis of Thomas' letter to Delano. Further negotiations took place after April 12, 1907, Fetzer testified that on April 16, 1907, he had a conversation with Thomas in which Thomas asked him to include in the Keller-Nafer purchase $80,000 to cover $15,000 to be used by Thomas and Henley for "railroad purposes," and $65,000 previously advanced to Thomas and Henley by Fetzer for railroad purposes; that he, Fetzer, thereupon on April 25, 1907, wrote to Thomas submitting a new proposition, as follows:

"Based on my successfully carrying through the verbal negotiations I have had on, I beg on behalf of myself to make you the following proposition for the premises known as the Nafer and the Keller Coal Yards, and specifically described as follows: I am able to deliver to you: The West half of Lot 4, Lots 5, 6, 13 and 14 in Block 26, subject to a mortgage of $100,000, due on or before five years at 5%. Lot 3 and the E. half of lot 4 in Block 26, the W. half of Lot 5 and Lots 13, 14, 3 and 4 in Block 27, subject to a mortgage of $150,000, due on or before five years at 5%. Lots 3, 4, 5, 12 and 13 and 14 in Block 6, subject to a mortgage of $150,000, due on or before five years at 5%. I agree to accept in payment of the foregoing: $200,000 in cash, and the following described property to be clear: Sub-lots 1 to 5 incl. and Lots 6, 7, 8 and 11 in Block

27, and Sub-lots 1 to 5 incl. and Lot 10 in Block 6. Under this proposition, in the deeds going to you you assume the three mortgages aggregating $400,000 and agree to pay the same, and this proposition is based upon my being successful in carrying out the verbal negotiations I now have on."

Fetzer testified that on April 24, 1907, he submitted to Thomas verbally the proposition contained in his, Fetzer's, letter to Thomas of April 25, 1907. On April 24, 1907, Thomas wrote a letter which he at first addressed to "F. A. Delano." Afterwards he struck out Delano's name and wrote at the top of the letter the word "Memo." The letter is as follows:

"Mr. Fetzer will see you tonight about a new proposition he has to make in three-ply deal covering the Hafer and Keller properties. Hafer has refused to take $450,000 for his property and Mr. Fetzer now proposed for $700,000 to convey to the Western Indiana Company all of Hafer's property and all of Keller's property excepting Lots 6, 7 and 8, which are to be conveyed to Hafer together with the following lots belonging to the Western Indiana Company, viz: Lots 9, 10 and 11 in Block 6 and Lots 1, 2, 3, 4, 5, 6, 7, 8, and 11, in Block 27; Lots 9, 10 and 11 fronting south on 23rd Place, Lots 6, 7 and 8, fronting north on 23rd Place, Lots 1, 2, 3, 4, and 5 fronting west on Canal street and Lot 11 fronting south on 24th street. This eliminates Keller and gives Hafer a solid piece of property 123 feet in width extending from 23rd street to 24th street and gives the Western Indiana a solid piece of property from 23rd street to 29th street excepting the church properties and the property conveyed to Hafer above described. There is a great advantage in having the solid property between 23rd street and 29th street which this deal would give us, but the difference in square feet between the property which Keller and Hafer convey to the Western Indiana Company and the property which

we convey to Hafer in part payment represents over $10.00 per square foot which is of course an extravagant price and would not be entitled to any consideration whatever were it not for the added value it gives to the rest of the property."

Fetzer testified that he saw Delano on the evening of April 24, 1907, and submitted the revised proposition to him. Delano testified that no such proposition was ever submitted to him and that if it had been, he would have rejected it. Fetzer admitted in his testimony that he did not tell Delano that $80,000 was to be included in the proposition to be used by Thomas for "railroad purposes." Fetzer testified that he told Thomas that he had submitted the revised proposition to Delano and that Delano had approved of it; that Thomas requested him to write a letter for the file showing Delano's approval. The following letter, dated April 25, 1907, was written by Fetzer to Thomas "for the file:"

"Referring to the proposition herewith enclosed and of even date, would say that I took this matter up with Mr. Delano last evening and explained the same to him fully and in detail and stating that in my opinion it was a better deal than the former one. In this statement Mr. Delano at once concurred and stated he would call you on the 'phone and urge its acceptance. Mr. Delano, after asking one or two questions, so as to understand it, had no hesitancy in approving the deal, nor do I believe you will if you will give it detailed consideration."

Delano denied that he had any such conversation with Fetzer or that he had ever approved the proposal.

The Keller-Hafer purchase was finally closed by changing the terms of $200,000 in cash and $400,000 in mortgages, as specified in Fetzer's pretended proposal to Thomas of April 25, 1907, to $275,000 in cash and $325,000 in mortgages. The amount actually

paid to the vendors, as we have previously stated, was $465,000 and not $600,000, thus leaving a deficit of $135,000. Fetzer's testimony on the trial explaining this deficit of $135,000 discloses conduct of himself and Thomas of such turpitude that in order fully to understand their conduct the testimony of Fetzer should be set out at some length. Before stating Fetzer's testimony on the trial in the case at bar in respect of the deficit of $135,000, we should call attention to the fact that the testimony of Fetzer in regard to the item of $65,000 which Fetzer claims was included in the $135,000, varied from the explanation of the $65,000 which Fetzer gave to the Grand Jury which investigated the transaction of the Keller-Hafer Coal Yards, and it also differed from the explanation of the $65,000 which he gave on another occasion where he is referred to as having testified "before Judge Sullivan."

In a letter to W. H. Lake, forman of the Grand Jury, Fetzer stated in respect of the item of $65,000 as follows:

"Now, in order to pay Thomas and Henley cash they changed my offer of $200,000, in cash, and $400,000, mortgage, to $275,000, cash, and $325,000 mortgage, - it being understood Thomas was to receive $65,000 in cash and Henley $10,000 in check."

In testimony referred to as having been given "before Judge Sullivan," Fetzer testified in regard to the $65,000 as follows: "When I made settlements from time to time with the railroad company I always sent a check unless they asked for currency. In this instance Thomas asked for currency. I didn't tell Field what I wanted that money for; I didn't know, and Thomas gave me no impression as to why he wanted that money. I told Judge Field that I charged Thomas with $65,000 out of the Keller-Hafer deal, at Thomas' request. When I took the first Keller-Hafer proposition

down Thomas said he wanted $65,000 for railroad purposes, and I left him my proposition to sell the property to them, until I was able to get together the $65,000 of currency to give to Thomas which he wanted for railroad purposes. And I told Field he wanted that currency of $65,000 for railroad purposes, and I have never known and did not tell Field what those purposes were."

On the trial in the case at bar Fetzer's testimony in respect of the item of $65,000, as quoted from the abstract, was as follows: "Prior to the negotiations on the Keller-Hafer deal I had paid Thomas $65,000. I think I had paid Hanley $10,000 and $5,000 at the time. ** As to my understanding that the $80,000 was to repay me for what I had advanced them, I say in the early part of the negotiations, when he [Thomas] told me first he would have to have this amount of money for railroad purposes, I didn't realize that out of that he [Thomas] would pay me what I advanced. He was to fix it up with me shortly but not out of the Keller-Hafer."

It will be observed that in Fetzer's letter to the Grand Jury Fetzer stated that Thomas was to receive the $65,000 and that he was to receive it in cash; that in Fetzer's testimony before Judge Sullivan, Fetzer stated that Thomas was charged with the $65,000, but that he was not to receive it until he, Fetzer, was able to get the $65,000 together; that in Fetzer's testimony on the trial in the case at bar, Fetzer was to receive the $65,000.

It will be noted further that Fetzer testified in the trial of the case at bar that in his testimony "before Judge Sullivan" Thomas wanted $65,000 when he, Fetzer, first took the Keller-Hafer proposition to Thomas; and that on the trial in the case at bar Fetzer also testified that in the early part of the negotiations Thomas was to pay him the $65,000 but not out of the Keller-Hafer purchase.

Further testimony of Fetzer on the trial in the case at

bar in regard to the Keller-Hafer purchase, as quoted from the abstract was as follows:

"My recollection is that Thomas first took up with me the matter of the Keller and Hafer yards purchase about April 9th or 10th. Thomas said that if I could get the right kind of price from Keller and Hafer and could buy in bonds like I had bought the Corkery coal yard, that he thought he would entertain the proposition. I called on Hafer and started negotiations with him, and also with Keller. Hafer first made a proposition indicating he would consider a proposition. My recollection is about $400,000. Might have been $450,000. I told him I would see what I could do. He wanted me to consider a proposition to exchange properties. And then I went ahead with Keller. Next day Hafer, after this proposition of the letter of April 12th, said he would not sell out, and would insist on an exchange. Keller on April 12th made me a price of $350,000. My letter of April 12th was on that basis. Later I was doing some work with John B. Brown and I asked him if he knew Keller, and he said he had had some negotiations with him on behalf of Thomas, or somebody. I said I was trying to buy Keller's yard, and he said, 'Keller made me a price of $325,000 on it.' That was a $25,000 better price than he had made me, but Brown's price was cash. I then went down and saw Keller, and notified him of this price of $325,000 and said I did not think it fair that he would not give me as good a price as anybody, and that if he would make me a lower price I thought I could land the deal. Keller made me a price of $325,000 for a limited time, not over three days, I think, and that he would have to have $50,000 in cash, and would take $275,000 in Western Indiana (the cross complainant) bonds. I took the matter up with Thomas and made a definite proposition based on Keller's and Hafer's revised propositions. April 12th I had conversations with Thomas, not with Delano. April 16th Thomas

said, when he came to accept, that they did not have any bonds, but he would have some released in June if I could float that with the $200,000, and he wanted me to include in the proposition, when I made it, $50,000 and $10,000 that I had paid to Henley and him: and in the meantime I think I had paid him some more; but at any rate it took an additional $15,000 to Thomas and $5,000 to Henley, so there had to be $80,000, which had been returned to Thomas direct or to Henley at Thomas' order, to be used for railroad purposes, which they wanted to go into real estate account, which had to be included in this proposition of April 25th. *** The $15,000 in addition to the fifty originally given me, was paid to Thomas except such amounts as had been paid to him between the $50,000 and this time. I did not pay $15,000 at that time. It was turned over to him in currency each time, by myself, and I paid $10,000 to Henley in March, and I gave him five more at this time in check for $5,000. I didn't pay him in currency. *** On April 11th I think the Keller-Hafer transaction had not yet been inaugurated. My opinion is I didn't have any money remaining in my hands after the payment of my check of April 16th to Flemming, $25,000. I think they owed me money. I had not my $65,000 back, that I had advanced. The Corkery proposition at $750,000 I thought was made about March 8th or 9th; March 9th possibly. It was about March 8th or 9th. When these Canal street deals outside, exclusive of Keller, Hafer and Corkery, were closed and I had paid out all the money advanced me, I would state in a general way that I think I was a creditor of the road for $60,000. Before that time, on March 14th, I paid $50,000 to Thomas. On February 4th I paid $3,000. And six and six. Making $65,000. No provision had been made for the $3,000, the $6,000, or the second $6,000, for the repayment to me of these moneys, up to the time the deals were closed, and I had exhausted the moneys in my

hands, for the Canal street properties. Nothing was incorporated in the consideration of any of the Canal street properties to cover these amounts prior to the Keller and Hafer deal, and the $50,000 had not been returned to me from any of the deals on Canal street. When I had substantially closed all the Canal street deals no provision had been made for the repayment of the $65,000 that I had paid to Thomas, and such amounts as I had paid to Henley; and I guess there were other real estate deals in contemplation, but Thomas said he would fix that matter up and I kept after him for it. I absolutely rested simply upon his promise, to fix the matter up. I had no security of any kind, not even a lead pencil memorandum. Nothing that in the event that he died that could prove the facts. I had not asked Thomas to take care of the $3,000 and the two $6,000 items prior to March 14th, when I advanced the further $50,000. The repayment of the $65,000 was left unprovided for, because there was no place apparently that it could be fixed up; and Thomas after that wanted some more money. *** Prior to the negotiations on the Keller-Hafer deal I had paid Thomas $65,000. I think I had paid Henley $10,000 and $5,000 at the time, but he got $15,000 out of the Keller-Hafer transaction. What I meant in my letter to W. H. Lake, when I said that in order to pay Thomas and Henley cash, it being understood Thomas was to receive $65,000 in cash and Henley $10,000 in check, when as a matter of fact I had already paid them some time before, was that he was to pay it back to me, and he couldn't pay it back unless he received it from some other source, and so he received it. I will state in this connection when the negotiations were on, and first on, I didn't understand that the $80,000 which he would have to have for railroad purposes was to reimburse me; that he was to reimburse me was

understood, but he was to have it for railroad purposes and I asked him if he could use bonds, and he said he thought it could be arranged. When I found out that he thought it could be arranged and that meant that I should take bonds, and I could not do that, I could not do it physically, and I told him I would have to have the cash which I paid him, and that was the reason for the change. In this connection, I mean with the Keller-Hafer deal. As to my understanding that the $80,000 was to repay me for what I had already advanced them, I say in the early part of the negotiations, when he told me first that he would have to have this amount of money for railroad purposes I didn't realize that out of that he would pay me what I advanced. He was to fix it up with me shortly, but not out of the Keller-Hafer. In the early part of the negotiations, as I understood it; it had no connection with that deal. If I remember rightly, the day before the deal was closed I made a proposition on the theory that the bonds should come back, and I didn't know until the very time when the Western Indiana [the cross complainant] was going to accept it that the $80,000 was in part at least to reimburse me, and I was expected to take bonds. I had the understanding that that $80,000 was likewise to be used for some railroad purpose other than paying me back. *** Referring to my letter of 6 May, 1910, in which I say any money received in the Keller-Hafer transaction was paid to Thomas or Henley, it being understood Thomas was to receive $65,000 in cash, Henley $10,000 in check, and this included $30,000 to me for financing, it is on the theory that it went to make a payment which they were to pay back. None of the physical money went to Thomas or Henley. I think I gave one check to Henley out of that money. The $275,000 cash, I think the check was for $5,000 or $10,000. If you figure that $65,000 in cash went to make a payment that Thomas was to pay, I gave it to him out of moneys received in

that transaction. I did not give him physically the $65,000. I did retain the $65,000 passed to me by voucher, and which was deposited to my account, included in the $275,000 voucher. I thought I said I gave Henley a check for $5,000. That was in addition to the check for $10,000 in the first paragraph of my letter. My recollection is I did not give Henley that $10,000 in check after I received the voucher for the Keller-Hafer transaction from the Western Indiana [the cross complainant.] What I referred to as having afterwards paid Henley was an additional $5,000 which I gave to Henley on May 2, 1907.*** I think the moneys to be included above the actual amounts of moneys or bonds to be paid Keller and Hafer was discussed on April 24th. Thomas said he would have to have some $80,000 for railroad purposes himself out of the Keller and Hafer proposition, and not for reimbursement to me for the $80,000 I had already paid him and Henley. The $80,000 mentioned in the conversation of April 24th developed on April 25th to be a part of the money which I had previously advanced him, but my recollection is very clear that it was not mentioned, as that money on April 24th. There was nothing said about 'additional' or anything of that kind. He simply said $80,000 would have to come out of it. *** I didn't find out until the 25th that the $80,000 was to be returned to me. ** So far as I understood on the 25th he was to get another $80,000 out of this deal. No provision was then made for reimbursing me for the $80,000 that I was already out. *** There was no other transaction than the Keller and Hafer pending at this time, and so far as I knew none other contemplated. *** They changed my proposition of April 25th from $200,000 in cash and $400,000 in mortgage, to $275,000 cash and $325,000 in mortgage. In my judgment all the changes were made between April 24th and 26th. *** There was a payment of a debt owed by Thomas or the railroad to me.** I did not at any time communicate to Belenc these changes in the letter of April 25th. He was not in town then, the day when the changes were made. The lots conveyed to Hafer, which had been purchased from Keller, lots 6, 7, 8, and 11, in Block 6, were left out of the letter because they intended to give them to Hafer and not sell them to the railroad. As a matter of fact, they were part of the consideration that went to Hafer. I would say they were also a part of that for which I paid the consideration that went to Keller."

It will be observed from Fetzer's testimony, which we have quoted above, in regard to the deficit of $135,000, that included in the $135,000 there was $80,000, which was composed of the following items: $65,000 to be returned to Fetzer for moneys advanced by him to Thomas; $10,000 to be paid to Thomas; and $5,000 to be paid to Henley. Waiving the question as to what effect on the credibility of Fetzer's testimony, his contradictory statement in the letter to the foreman of the grand jury that Thomas was to receive the $65,000, may have, and assuming that the $65,000 was received by Fetzer for advances made by Fetzer to Thomas for "railroad purposes" prior to the Keller-Hafer purchase, the question arises whether the advances were made out of the funds of the cross complainant or out of the personal funds of Fetzer. If they were made out of the funds of the cross complainant, they should not have been returned to Fetzer. From Fetzer's testimony, presumably they were made out of Fetzer's personal funds, as he speaks of himself as the creditor of Thomas or the cross complainant. It is highly improbable, however, that Fetzer had advanced the $65,000 to Thomas out of his personal funds prior to the Keller-Hafer purchase. A month before the Keller-Hafer purchase, all the transactions with the cross complainant had been closed, and the Keller-Hafer purchase was not contemplated. Fetzer says that for the $65,000 he "had no security of any kind, not even a lead pencil memorandum." If Fetzer had made advances to Thomas aggregating $65,000 prior to the Keller-Hafer purchase, and if all of the deals had been closed with the cross complainant before the Keller-Hafer purchase, and the Keller-Hafer purchase was not contemplated, it is not reasonably conceivable that Fetzer should have neglected to have the $65,000 repaid to him out of the funds in the transactions prior to the Keller-Hafer purchase. But in any event, whether the alleged advances to

Thomas aggregating $65,000 for "railroad purposes" were made out of the funds of the cross complainant or out of the personal funds of Fetzer, we are of the opinion that the $65,000 lawfully could not be used for "railroad purposes," and that therefore in his accounting with the cross complainant Fetzer is not entitled to be credited with the $65,000. We are also of the opinion that Fetzer's account should not be credited with the alleged payments to Thomas and Henley of $10,000 and $5,000 respectively.

Counsel for Fetzer contends that after the purchase of the Keller-Hafer Coal Yards, a full report of the transaction was made by Thomas to the board of directors of the cross complainant; and furthermore that one of the directors, Delano, was thoroughly conversant with and approved of the whole transaction before the purchase was made. It is true that after the purchase of the Keller-Hafer Coal Yards, Thomas did make a report to the board of directors, but the report was not full and complete. The report stated that the Keller-Hafer Coal Yards had been purchased for $600,000; and that certain lots, describing them and giving their cost, had been conveyed to Hafer "in exchange;" but the report did not state in terms that the four lots purchased by the complainant from Keller were the lots that had been conveyed to Hafer "in exchange." The report did state the number of square feet purchased by the cross complainant from Keller and Hafer, respectively. If with this data the directors had computed the square feet of the lots conveyed to Hafer "in exchange," the directors might have ascertained that the four lots of Keller had been conveyed to Hafer "in exchange;" but as the lots conveyed "in exchange" to Hafer were specifically described in the report, the directors reasonably would not have been expected to make a computation in square feet. The report of Thomas did not show, and counsel for Fetzer does not contend that it showed, that in the $600,000 reported by Fetzer

as the cost of the Keller-Hafer Coal Yards, there was included $135,000 which, according to Fetzer, was composed of $15,000 in cash to Thomas and Henley; $65,000 retained by Fetzer for cash previously given by him to Thomas and Henley; also $25,000 retained by Fetzer for "financing" the purchase of the Keller-Hafer Coal Yards; and $30,000 for Fetzer's commissions, out of which $30,000 Fetzer gave Kappes $11,000 in bonds.

The evidence as to whether, before the Keller-Hafer Coal Yards were purchased, Delano knew the terms of the purchase is conflicting. Fetzer testified that he explained the proposed transaction fully to Delano. On the other hand Delano positively denied the testimony of Fetzer. We have previously referred to the evidence in this respect. Without deciding the question whether Delano was fully informed of the proposition before the purchase was made, it is sufficient to state that Delano never knew, and it is not contended by counsel for Fetzer that Delano knew, that the $600,000 reported by Fetzer as the cost of the Keller-Hafer Coal Yards included $135,000 which was composed of the several items which we have indicated.

Counsel for Fetzer contends that all of the letters which we have set out above between Fetzer and Thomas and Henley, Kappes and Thomas, and Thomas and Delano, in regard to the Keller-Hafer purchase were written in good faith by Fetzer, Thomas, Henley, and Kappes. In our opinion the letters are part of a conspiracy between Fetzer, Thomas, Henley and Kappes to defraud the cross complainant.

Counsel for Fetzer argues further that Fetzer was not the agent of the cross complainant in the Keller-Hafer purchase, but was an independent vendor. We do not think that the argument of counsel for Fetzer is tenable. As we have previously stated, according to the terms of the original contract between Fetzer and the cross complainant, Fetzer was the agent of the cross complainant in all of the purchases and Thomas had no power to

change that contract. We are of the opinion that if Thomas did agree with Fetzer that it should be changed in the Keller-Hafer purchase so that Fetzer became an independent vendor, Thomas acted without authority and the board of directors did not know of nor acquiesce in such change. Furthermore there is specific evidence in regard to the Keller-Hafer purchase which negatives the idea that Fetzer was an independent vendor. The moneys he disbursed were furnished to him by the cross complainant; he made a report to the cross complainant of the disbursements; and he rendered a bill to the cross complainant, which the cross complainant paid, for a guaranty policy in the amount of $600,000 to cover the property, purchased by the cross complainant in the Keller-Hafer purchase.

Counsel for Fetzer further contends that the trial court erred in not allowing Fetzer to credit his account with the item of $25,000 which Fetzer claimed was due to him for "financing" the Keller-Hafer purchase. The action of the court in this respect is assigned as a cross error by Fetzer.

In view of the fact that in our opinion, Fetzer was the agent of the cross complainant and was guilty of fraud in the Keller-Hafer purchase, it follows that Fetzer should not be allowed the credit of $25,000. Moreover, the evidence does not show that the cross complainant knew that Fetzer was charging $25,000 for "financing" the purchase. Fetzer does not contend that the charge was made with the express knowledge or consent of the cross complainant; and the report of Fetzer to the cross complainant did not show the amount of $25,000 as a separate item. That amount, according to Fetzer, was included in the total amount reported. Again, the evidence does not show that it was necessary for Fetzer to finance the purchase.

From the views that we have expressed in respect of the

Keller-Hafer purchase it follows that Fetzer should pay to the cross complainant the sum of $135,000, which is the amount of the deficit in the Keller-Hafer purchase.

In the purchase of what are designated as the Hegewisch purchases, there are three groups of purchases in which Fetzer's accounting to the cross complainant is in dispute; they are the Gilchrist purchase, the Lewins-Graves-McCauley purchase, and the Peters purchase. All of these properties are situated in Hegewisch.

The Gilchrist purchase, although reported by Fetzer as a single purchase, embraced six different transactions. Fetzer reported the purchase of these properties as having been bought from Robert Gilchrist, a dummy, for $65,000. Of this amount $45,000 was cash and $20,000 was in mortgages assumed by the cross complainant. It is doubtful whether the mortgages were made in good faith. Counsel for the cross complainant contends that they were placed on the properties without regard to contiguity or value; that they were simply made to afford a basis for false reports and that they do not represent any part of the true considerations paid for the properties. The evidence shows that the real vendors received only $30,382. The deficit amounts to $34,618. Fetzer admitted in his testimony that the $65,000 he reported as having been paid to the vendors was a false amount. In accounting for part of the deficit Fetzer testified that he gave Thomas $17,200 to be used by Thomas for "railroad purposes" and included the $17,200 in the $65,000 which he reported as the amount paid the vendors. Fetzer testified that Thomas at first asked him for $15,000, but that when he, Fetzer, "came to turn the currency over to him," Thomas said "the expense had been more then he figured on and he wanted $17,200 in currency." Fetzer also claimed that he was entitled to $4,475 as his profit in the transaction. Fetzer's testimony was as follows:

"Thomas when I came to turn the currency over to him said

Boilermaker problems in relation [illegible] to the gross consumption the sum of [illegible] the amount of the deficit in the Boilermaker's [illegible].

In the purchase of [illegible] purchases, [illegible] accounting [illegible] district purchases, [illegible] Pathe purchases. [illegible]

The district purchases, [illegible] by Thomas as a single purchase, [illegible]. Thomas reported the purchase of [illegible] from Robert [illegible] was each [illegible] pledment. It is doubtful whether the [illegible] in good faith. [illegible] placed on the [illegible] that they were [illegible] that they [illegible] for the properties. [illegible] netted only [illegible] mixed in his [illegible] paid to the vendors [illegible] the deficit [illegible] by Thomas for "original purchase" [illegible] $68,000 [illegible]. [illegible] testified that [illegible] as, however, [illegible] "the [illegible] in purchase. [illegible] as his profit in the [illegible]

[illegible]

the expense had been more than he had figured on, and he wanted $17,200 in currency. I paid him $15,000 in currency in the first instance, and I told him the deal did not involve that, and he said he had to have it, and to take care of it in some other way. I did not have it then, and had no deal on at that time, and afterwards I paid him $2,200 more. That went to Thomas. * * * In my accounting this $17,200 was paid to him out of what I call the first deal. That was my agreement with him, to pay it."

It is the contention of Fetzer that he acted as an independent vender in this transaction; and that in making the purchases he was associated with a man named Lawrence Cox, president of a small national bank at Hegewisch. Cox's testimony indicates that he considered himself an independent vender, and not an agent of Fetzer. Cox testified as follows:

"I first saw Mr. Fetzer sometime in October. Mr. Fetzer came into the office and wanted to know if I had control of this strip of land along the Western Indiana. I said that Mrs. Cox owned approximately 1,500 feet facing the Western Indiana and adjoining it. He said he wanted to get a strip of land along there for a railroad, and he said the Western Indiana [the cross complainant] already had a right of way and he was not in a position to condemn this land and had to pick it up as fast as he could, in order not to be held up on it. He said, 'If you will go out and pick up this land as reasonably as you can. I will come in here and close it, because I am not in a position to close it - to go around from place to place.' And at that time I think we discussed the fact that it was hard to get currency, and a stranger coming in there would have a little difficulty in convincing these people, unless he carried the currency right in his pocket. I think that was * * the reason why he wanted to do business with us, and get

it cleaned up in a hurry."

Cox also testified that he did not "go out" for Mr. Fetzer because he "did not leave us any money to do any business;" that Fetzer said that "if he would pick up that stuff, he would take it off our hands;" that "we went out and picked it up and took the chance."

Cox testified further that "Fetzer was not present at the closing of the deals," and did not take receipts from the vendors; that Fetzer was not present when the vendors got their money, that they did not see him at all; that he, Cox, would not say that they did not see Fetzer in any instance.

William Sippel, cashier of the bank of which Cox was president, testified that "we went out and brought the owners in the bank;" that "the property was purchased there; that Fetzer made the purchases."

In accounting for checks paid to him by Fetzer, amounting to $13,300, Cox testified that $3050 was paid for four lots which stood in the name of Cox's wife. It is contended by counsel for the cross complainant that the evidence does not show that such lots were bought.

Again Cox testified that Fetzer paid him $1700 for one lot which stood in the name of Mrs. Cox. Counsel for the cross complainant maintain that no such transaction took place; that the only purchase from Mrs. Cox was a 34 foot strip for which Cox testified that he was paid $7800 by Fetzer's check dated December 3, 1907. The conveyance of the 34 foot strip was dated and recorded November 6, 1907, that is seventeen days before the strip was paid for. There is in evidence a receipt of Cox for $19,500 dated December 3, 1907, the same date as Fetzer's check to Cox. The receipt recites that $11,700 had been previously paid for certain property described in the receipt; and that the balance, namely,

$7800, had been paid for certain other property described in the receipt. Fetzer was unable to explain the coincidence that the identical amount of $7800 was, according to Cox's testimony, paid to Cox for the 34 foot strip by Fetzer's check dated December 3, 1907, the same date as Cox's receipt. Since the evidence shows that the 34 foot strip was not worth $7800, the fair inference is that the $7800 was paid for the other property described in Cox's receipt.

In respect of his association with Cox, the testimony of Fetzer is as follows:

"I went to see Cox to see what he wanted for this property. I never had seen him before. He made me a price on the 34 foot strip. I don't remember what it was. I think I paid him $200 on the bargain. Kappes was waiting outside and I told him I had bought it, and he said Thomas had not authorized you or anything. I said, 'I think he will, and I did not want to let this get away from us.' So I went back and told Thomas I was prepared to make him a proposition; and he said he had to have $15,000, that the railroad had been to some expenses in the matter, and he wanted to charge to Real Estate Transaction in this deal, and for me to include that in the proposition. I made Thomas a proposition of $65,000 and wrote him a letter, Exhibit 366. I told Thomas that if he would give me $35,000 in cash, which included $15,000 to be returned to him, and a check for $35,000 and $10,000 in bonds, and assumed mortgages of $20,000, that I would deliver this property to him free of any liens except the $20,000 in mortgages. And he accepted the proposition, and gave me voucher for $20,000, the $35,000 in cash, and $10,000 in bonds, which has been introduced in evidence. I then undertook the purchase of the property, after I got his voucher. I went down there, and it was a time when they were issuing Clearing House certificates, and the people down there demanded currency."

Fetzer also testified as follows: "Most of the purchases

were completed through Cox. I got the prices from him. I had to take currency; it had to be done quick, because I only had verbal prices. * * Cox was to buy the property and give me a price."

In his letter to Thomas, referred to in Fetzer's testimony as Exhibit 366, Fetzer purported to be an independent vendor. T he letter, which was dated November 9, 1907, began as follows: "Agreeable to your request in relation to a definite proposition as to some property in Hegewisch would say I am prepared to deliver to you * * ."

Thomas enclosed this letter of Fetzer in the following letter which Thomas wrote to Kappes on November 16, 1907:

"I hand you herewith a communication from Mr. John C. Fetzer in relation to the property recently purchased between Hegewisch and a point 6,000 feet north of Hegewisch. My understanding is that receipts will be furnished showing the prices paid the owners of the property. You will recall the question that was raised by the Auditing Committee on a former occasion about receipts from original parties. Do you see any objection to Mr. Fetzer's arrangements for buying this property?"

It will be observed that Thomas states that "receipts will be furnished showing the prices paid the owner of the property" although Fetzer is pretending to be an independent vendor.

Kappes replied to Thomas' letter as follows:

"Referring to your favor of the 16th inst., with attached letter from Mr. John C. Fetzer of Nov. 8th, being a proposition from him to deliver certain property therein mentioned and an estimate of the probable cost of certain other property, would say that I see no objection to such an arrangement with Mr. Fetzer. In view of the fact that Western Indiana [the cross complainant] Bonds must be used as part payment it would seem to be altogether the best arrangement. Mr. Fetzer understands about taking receipts in compliance with the Auditors' Requirements and I understand

he will do this wherever it is possible. A few days ago I went on to the ground and made a very careful inspection of Blocks 8 and 22 and would say that if Mr. Fetzer can deliver these two blocks at the figure named by him or even at slightly higher figures, I would recommend that arrangements be made with him to secure these blocks. I do not believe they can ever be acquired for less than they can now and will most likely cost considerable more later on."

On the bottom of this letter of Kappes there is the following notation in ink: "Confer in regard to the amount paid for the two blocks marked 'x' B. T. 12/4."

It will be noted that in his letter Kappes says, "Mr. Fetzer understands about taking receipts in compliance with the auditor's requirements and I understand he will do this wherever it is possible."

If Fetzer was an independent vendor why should he take receipts from the vendors in compliance with the requirements of the auditor of the cross complainant? Moreover if Fetzer was an independent vendor there was no reason why the auditor should not have been so informed, and the receipts would have been unnecessary.

In the transaction in question, namely, the Gilchrist purchase, we are of the opinion that Fetzer was the agent of the cross complainant and not an independent vendor.

We do not think that Thomas had any authority to permit Fetzer to abandon his status as agent under his original contract with the cross complainant, and to assume to act toward the cross complainant as an independent vendor. And we do not think that the cross complainant knew that Fetzer was pretending to act as an independent vendor. The fact is that the evidence shows a concerted effort on the part of Fetzer, Thomas and Kappes to induce the auditor of the cross complainant to believe that Fetzer was acting as an agent and was producing the receipts

of the real vendors.

Furthermore there are specific facts in the transaction which show that Fetzer was an agent of the cross complainant. He was furnished the money by cross complainant with which to make the purchases; he made reports to the cross complainant of the disbursements of the money; he sent the bill to the cross complainant for the guaranty policy of the title of the property.

In our view, however, the question in this transaction, as well as in the other Hegewisch purchases in controversy, is not whether Thomas had authority to deal with Fetzer as an independent vendor, but whether there was a conspiracy between Thomas and Fetzer to defraud the cross complainant. We think that there was such a conspiracy; and that in pretending to recognize Fetzer as an independent vendor, Thomas was merely carrying out his part of the conspiracy. We are also of the opinion that Kappes was a co-conspirator; and we are further of the opinion that Cox was not an independent vendor. We think that Cox was used by Fetzer as a convenient agency to assist Fetzer in perpetrating his fraud against the cross complainant, and that Cox did not act with entire innocence in the matter.

From the views that we have expressed it follows that in the transaction in question, namely, the Gilchrist purchase, Fetzer should pay to the cross complainant the sum of $34,618.

In the Lewin-Graves-McCauley purchase the evidence shows a deficit of $15,240 between the amount reported by Fetzer as the cost of the property and the amount received by the vendors. The property was reported by Fetzer as having been purchased in a single purchase from Lewins, Graves and McCauley, dummies, although there were sixteen separate vendors. The properties

of the road [illegible].

[illegible]

[illegible] tion which [illegible] the [illegible]

He was [illegible] [illegible]

make the [illegible]; [illegible]

the [illegible] [illegible]

complaint [illegible]

[illegible]

[illegible] nation, [illegible] [illegible] controversy,

is not [illegible]

independent vendor, [illegible]

[illegible] and [illegible]

that there was [illegible]

recognize [illegible]

[illegible] the [illegible]

[illegible] that [illegible]

of the [illegible]

that for [illegible]

Patent in [illegible]

and that [illegible]

[illegible]

In the [illegible]

Patent [illegible]

[illegible]

above a [illegible]

[illegible]

The property [illegible]

[illegible]

[illegible]

were situated in Hegewisch. Fetzer reported these properties as having cost in the aggregate $43,500, of which $20,000 was in cash and $23,000 in mortgages, assumed by the cross complainant. The same remarks that we made about the mortgages in the Gilchrist purchase apply also to the present purchase.

In direct conflict with Cox's contention that he was an independent vendor, there is testimony of some of the real vendors of the properties that Fetzer actively participated in the negotiations for the purchase of their properties.

Frank Bock, one of the real vendors in the Lewins-Graves-McCauley purchase, testified that he dealt with Fetzer. Bock's testimony was as follows:

"I sold that property to Mr. Fletcher. I have an idea that gentleman there (pointing to Fetzer.) His name might be Fetzer. I don't know when it was I sold it. Mr. Sippel, the banker, told me that if I wanted to sell my lots there was a buyer at the Hegewisch Bank. I went down there and Mr. Fletcher and another gentleman asked me, they were at the table there and they asked me for my price. I gave my price and they closed the deal. I got $1,200."

Pauline Cherry, another of the real vendors in the Lewins-Graves-McCauley purchase, testified that Fetzer was present when the sale of her property was closed.

The Lewins-Graves-McCauley purchase, according to the testimony of Fetzer, was made in the following circumstances:

"Shortly after the proposition of November 9th Thomas sent for me and said he thought the Kensington & Eastern were coming down, and he thought they had ought to have as good a representation in Blocks 8 and 22 [the blocks in which the property in the Lewins, Graves and McCauley purchase was situated] as he could get, without too much investment of money, to buy as

many lots as were not over-well improved, so that he could block them in buying up these two blocks, and then go around Block 5 [the block in which the property in the Gilchrist purchase was situated] and he would like to have it done right away, and would like to have me make him a proposition of what I could do that for; and I told him that in my first proposition of November 9th it did not include taking care of Kappes, and I had an arrangement to take care of him in this matter, and he said, 'Include it in this second proposition;' and I then made a visit to Negawisch and seen Cox, and at that time I went over the matter in detail with him as to what he was sure he could do, and I made Thomas a proposition, which is the amount of $43,500 on which a letter has been introduced, Exhibit 357. I looked over the property contemplated to be purchased at the time I went down to see Cox. I don't remember that I made him the proposition that I would deliver him the property for $43,500 before the letter of November 15, 1907, was written. The entire cash part to be used in the proposition was not furnished by me upon acceptance. The entire amount of money involved in the proposition that I made him was paid to me in cash. I paid Kappes ten bonds, and in my estimate of that transaction it included the bonds. I didn't pay him at once; I had some financing to do; I paid him when I got it. When I said out of the $43,500 I paid Kappes $10,000 in bonds, I did not mean physically out of it. I meant as a bookkeeping proposition."

It will be observed from the testimony of Fetzer that Fetzer and Thomas arranged "to take care of Kappes." Yet, according to Fetzer's testimony, Kappes knew nothing of property in Negewisch. Fetzer's testimony in this respect was as follows: "So I got hold of Kappes and asked him if he had any information there [in Negewisch] and he said he did not have any information, so I went down

[illegible]

and I think he went with me, to make some inquiries." Fetzer further testified that Kappes "did considerable to assist him at Hegewisch."

In the transaction in question, namely, the Lewins-Graves, McCauley purchase, for the same reasons that we have stated in regard to the Gilchrist purchase, we are of the opinion that Fetzer was not an independent vendor, but was the agent of the cross complainant; that Cox was not an independent vendor, but was merely used by Fetzer to assist him in defrauding the cross complainant; that there was a conspiracy between Fetzer, Thomas and Kappes to defraud the cross complainant.

It follows from these views that Fetzer should pay to the complainant the sum of $15,240, which is the amount of the deficit in this transaction.

The Peters purchase consisted of six separate properties. Fetzer reported the properties as having been purchased in a single purchase from Peters, his partner. The price of the properties, as reported by Fetzer, was $54,400. The evidence shows that the real vendors received only $36,927. Fetzer was assisted in making these purchases by Cox in the same way as in the Gilchrist and Lewins-Graves-McCauley purchases. Although Cox contends that he was in independent vendor in all of the Hegewisch purchases that he made in connection with Fetzer, the evidence shows in the transaction an question, namely, the Peters purchase, that in one of the properties included in that purchase two of the real vendors, John H. Lammering and Daniel Jordan, negotiated directly with Fetzer in regard to the purchases from them. In respect of the purchase from Lammering and Jordan, Cox testified that Lammering and Jordan had "three separate pieces of property" that he, Cox, "took over;" that he turned over the first one to Fetzer for $6,000; that he turned

over the other two to Fetzer for $1300; that he did not pay Lammering and Jordan "their purchase price before" he, Cox, "received money from Mr. Fetzer." The testimony of Jordan in regard to the transaction was as follows:

"As near as I can remember the conveyance was in November, 1907. At the meeting at the bank there were present Cox, Sippel, Lammering, Fetzer and myself. Fetzer offered us $35,000 for the coal yard and guaranteed the track in the new land that I had purchased from Cox providing we could get a track in there; that is the next land to Cox's land. We put $2200 up in escrow in the bank; when the track was in there I was supposed to pay Cox $2200. It was west of Cox's land. *** The name Daniel Jordan on the paper you show me marked November 26, 1907, [the purported receipt of Lammering and Jordan for $35,000] is my handwriting, the rest is in typewriting. I don't know, I don't think the paper was in that form at the time I executed it. I was not drunk, and I don't know if I signed my name, I certainly would not have signed it for $35,000 if I received $25,000. The amount I received was $25,000 - $20,000 in bonds and $5,000 in cash. I didn't receive $35,000 I am sure."

Fetzer's testimony in respect of the Lammering and Jordan transaction was as follows:

"As to being present when the deal with Lammering and Jordan was closed, I didn't close it, and I might have been in the bank building and I might have been in the room when it was closed. I don't remember that I was there, <u>but at the same time I might have been</u>. Cox made the deal. It was later than the second deal with Lammering and Jordan. As a part of the consideration there was paid to Lammering and Jordan $20,000 in bonds. It was paid by Cox, <u>and I brought the bonds down and gave them to Cox</u> and I think it

was paid in his bank. I do not think it was paid in my presence. It is not my impression that I personally delivered those bonds; I might have done it, but I don't think I did. I didn't take from Lammering and Jordan their receipt for $35,000 at that time. I didn't take that receipt after the closing of the second deal with Lammering and Jordan until Thomas stated he wanted receipts to cover the moneys that had been paid to him and Judge Neeley, I think it was."

Fetzer testified further that at different times he gave Cox the following amounts of money: $11,100, $10,000, $10,000; and also gave Cox ten bonds of the cross complainant. Shortly after Cox became associated with Fetzer the account of Cox in his bank began to show large deposits. As to one deposit of $11,900, Lippel, cashier of Cox's bank, expressly testified that it was a check signed by Fetzer, and presumably related to a transaction for acquiring land for the cross complainant or the Illinois Central Railroad Company.

From the testimony which we stated above in regard to the Lammering-Jordan purchase, it is apparent that the fact that part of the payment was made with bonds of the cross complainant is incompatible with the contention of Cox that he was an independent vendor. Also if Fetzer's testimony is accepted as true that he gave Cox money and bonds, such fact cannot be reconciled with the theory that Cox was making the purchases himself.

Another real vendor in the Peters purchase, John H. Brooks, testified that when the deal was closed for his property Fetzer was present. Brooks's testimony was as follows:

"Party came to the house one evening and wanted us to go to the Hegewisch International Bank, or whatever it is. My wife and I went over to the bank and they gave me $100 that night. Mr.

Cox was there and said that they would give us $2,500 for the property on Howard avenue, and told me to come the next morning between nine and ten o'clock and I could get the other $2,400. I went and met a man, his name was Fetzer or Fletcher, something like that. It was the only time I ever saw the man. I don't know that I would remember him. He was a well built man, not of small stature. They told me the 2,400 was ready. There was a $400 mortgage which was deducted from my $2,500. The interest on the $400 and the $400 was taken out of my $2,400 and we got the balance. I had gotten $100 the night before. $1900 was left in the bank and the balance of the money the cashier gave us through the bank, something less than $100. The paper you show me [receipt for the $4,500] has a signature similar to my signature, but I did not sign for $4,500, and furthermore the documents that I signed, my wife signed, unless they did some slippery hand work and shoved in another paper in the place of it, after I handed her the pen. I did not receive $4,500 and would not sign for $4,500. That was what I expected - I asked $3,500 and they jewed me down to $2,500; and I knew there was some underhand work at it, and that is just the reason I would not sign until I read it."

Fetzer admitted in his testimony that the body of the receipt was in his own handwriting. Fetzer testified that he did not know where the receipt was prepared; that it was probably prepared in Cox's room in Cox's bank.

In attempting to account for the deficit in the transaction under discussion, namely, the Peters' purchase, Fetzer testified that he added $14,800 at Thomas' request, to the amount paid to the real vendors; that Thomas wanted the $14,800 for "railroad purposes;" and that Thomas said that the Kensington and Eastern Illinois Railroad Company eventually would be compelled to buy

an interest in the land, and that he wanted to make the Kensington and Eastern Illinois Railroad Company pay the amount that was added.

Apparently the Illinois Central Railroad Company, operating through the Kensington and Eastern Illinois Railroad Company, was endeavoring to extend its line in a way that Thomas, according to Fetzer, considered antagonistic or detrimental to the interests of the cross complainant.

Fetzer's testimony in regard to the matter of the Kensington and Eastern Illinois Railroad Company relates back to the beginning of the Hegewisch purchases. His testimony, as quoted from the abstract, was as follows:

"There was no further real estate deal with the Western Indiana until November of that year, I think. Thomas sent for me to come right down, said that he had some difficulty with the Illinois Central, who were building from Kensington to Hammond, that the Illinois Central had been endeavoring to come along south and west of the Nickel Plate, which parallels the Western Indiana, and crosses the Nickel Plate and Western Indiana at about the boundary of the towns of Hegewisch and Burnham, at which place they would also cross the Pennsylvania; that it would make a bad crossing, through the interlocker, that they have been endeavoring to have it cross otherwise, north and west of Hegewisch on an elevation over the Nickel Plate and Western Indiana. He said, 'Now here is a map, we have only got a 66 foot right of way and the lots in Hegewisch are 125 feet deep on this block parallel to our line with a 16 foot alley, making 141 feet, and we ought to have 100 feet right of way, and the Illinois Central will probably want 100 anyway, and I want you to make a proposition right away; I ain't got any money, we

haven't any bonds; we haven't got anything; I want a proposition just on the best terms you can get me, upon a sufficient holding down there, that will drive them into our camp, so that we can make a settlement.' He says, 'They are sore as a boiled owl now, because we have done this, and accomplished this, and there is no use talking with them.' I went down and saw the proposition, and suggested to him that if he took this 34 foot strip west of the lots, and bought the lots in the first block, Block 5, that if he did not make a deal with the Illinois Central, and if they backed out of the proposition, he said, 'I would not be surprised if they would back out of the proposition if they can; this 34 foot strip, along your vacant ground, will only give you the strip you want for the future, and the lots will be a good team track for you.' He said, 'Well, make your proposition.*** Thomas insisted we should get prices on the balance of the property. He wanted me to make a propisition, so the railroad could get $10,000 more for him and $5,000 for some matters Judge Henley had on, in addition to the $17,200 which I had paid [in the Gilchrist purchase]. He wanted a third definite proposition, and I said I didn't care to make any more definite propositions. He told me to let him have $10,000 more, and Judge Henley $5,000. I told him I had paid him $17,200 [in the Gilchrist purchase] and I wanted to take the $2,200 out of the ten. He told me he could not do that, and he did take $9,800, so I paid him $17,200 out of the other deal [the Gilchrist purchase] and $9,800 out of this [the Peters purchase] to go back to him for railroad purposes; and I paid Henley $5,000 in Western Indiana [the cross complainant] bonds. I had a talk with Henley. He said this should be cash, but I said, 'Can't you use bonds in this matter?' He said he would see, and after a couple of days he

said he would take bonds, and they were turned over to him. I didn't make any proposition. Thomas wanted the matter made in the form of a proposition, which I declined to do, and I put the lots in at exactly what I paid for them, plus $14,800, and did not report them, Thomas seeing that I got credit. Total credit for $54,400 reported as the Peters transaction. I did not report it to the road [the cross complainant] that I had paid that sum; it was not a direct sale. After Thomas had seen that I got credit for it, he said he wanted to make the Kensington & Eastern pay for this, and wanted to know if I couldn't get vouchers at a higher price than I had paid. He said he could use those vouchers with the Kensington & Eastern in checking up their account and in settling with them; that he intended to make them pay for all of the expenses that the Western Indiana had been to in this matter, at least their proportion of them; that he wanted a direct proposition even after I had closed the deal. I told him I couldn't do that, that it was not a direct proposition; that I was willing to do the work for nothing, which I did; there was not a cent of profit in it. He asked me to get receipts in each instance for as much larger as I could to eat up the $14,800 paid to him and Henley, so that he could use receipts in settlement with Kensington & Eastern. I did get the receipts myself in connection with Cox. I did not send them to the Western Indiana [the cross complainant]. I handed them to Thomas, except the receipt of Lammering and Jordan. I sent that in a letter, and stated in the letter that it was getten as he suggested. *** The talk with Thomas in which he wanted to know if I could not get vouchers from these ga ple, at a higher price, I would say was after the deals were closed, if by 'closed' is meant after I had made arrangements to purchase the property.*** He wanted to know if we could not make them a direct proposition

and I told him no, because the deal had been made and payments made, and it wouldn't be a direct proposition, and he says, well, he wanted me to make one any way, and I said I would not be a party to it, and so I didn't have any profits or anything else in it. I just turned the deals over as I got them and did what he told me to, and he made his own settlement with the Kensington & Eastern, and he didn't want the Kensington & Eastern or their man, Skeen, to know that he had used bonds so that the Illinois Central in paying their portion of the cost would refund to them all of the cash that the Western Indiana [the cross complainant] had been out and they would be out no cash. *** There was no arrangement between Thomas and me that I was to get receipts which did not represent the actual payments; there was an instruction of Thomas, and my understanding with Thomas was that the receipts were to include the actual payments which I made on account of these purchases, and also what I had paid to him and Henley. *** At Thomas' request the receipts were gotten to include the $14,800 that has been returned. *** The $14,800 was not given the purchasers - the former holders of the property. ** I got these receipts at his request, so that he and his men could use them in their settlement with the Kensington & Eastern. It would be my deduction, so it could be made to appear that they had paid these amounts for the property in their settlement with the Kensington & Eastern. I was not present when they were used. *** When I started to make these purchases I understood it was a bona fide purchase for the Western Indiana [the cross complainant]. And for the Western Indiana [the cross complainant] I was going to charge a commission; but before I got into the deal I found it was not, and was going to be a deal in which money was going to Thomas and to Henley, and that I would have to make the accounting, and I did not want to do it. I had already purchased the property and made my proposition as to prices to Thomas, before there was any

suggestion of including $14,800 in it."

In this transaction, namely, the Peters purchase, we are of the opinion that Fetzer was the agent of the cross complainant; and that Cox was not an independent vendor. The reasons for our opinion are similar to those which we have previously expressed in regard to the Gilchrist and the Lewins-Graves-McCauley purchases. We are also on the opinion, for the reasons which we have previously indicated, and which we will enlarge upon later, that Fetzer is not entitled to be credited with the funds that he alleges that he gave to Thomas for "railroad purposes." We are further of the opinion that Fetzer and Thomas were guilty of perpetrating a fraud on the Kensington and Eastern Railroad company.

It follows from the views we have expressed that Fetzer should pay to the cross complainant the sum of $17,473, the amount of the deficit in the transaction in question, namely, the Peters purchase.

In discussing the matter of the Kensington and Eastern Railroad Company, counsel for Fetzer maintains that "every presumption from the evidence is that the" cross complainant "received and has retained from the Kensington & Eastern Railroad its full contribution to the inflated values;" and that the "instigator and beneficiary cannot force Mr. Fetzer, who received no share of the profit and was not the author of the scheme, to again pay it the money which it has already enjoyed."

Counsel for Fetzer has not pointed out the evidence from which it may be presumed that the cross complainant received and retained the benefit of the inflated values. Furthermore, even if the evidence showed that the cross complainant received such benefit, there is no evidence that the cross complainant received

the benefit with full knowledge of the facts; and assuming that the evidence showed that the cross complainant has retained such benefit, there is no evidence that the cross complainant retained the benefit with full knowledge of the facts. The "instigator" of the fraud, according to Fetzer's testimony, was Thomas, not the cross complainant; and there is no evidence whatever from which it may be inferred that the conduct of Thomas was authorized by the cross complainant.

In the purchase of property known as the Trotter purchase there were six lots, which were purchased separately. These purchases were reported by Fetzer as one purchase from Benjamin R. Trotter in the total amount of $50,000. Trotter was a dummy. He received two checks from Fetzer aggregating $50,000, and deposited one of the checks to the account of Robert Flemming, another dummy, and the other to the account of Peters, the partner of Fetzer. The evidence shows that only $39,350 was paid to the real vendors of the lots. All of the purchases were closed through the Chicago Title and Trust Company of Chicago, and the escrows showed that the total amount paid to the vendors was $39,350. Fetzer attempted to account for the deficit of $10,650 by testifying that he actually purchased the lots from a man named George H. Murphy for $46,300, instead of $50,000, as he had reported. Fetzer introduced in evidence an assignment of the properties by Murphy to Trotter for a consideration of $46,300, which included $8100 to be paid to Murphy, and a receipt from Murphy to Trotter for $46,300. Fetzer testified that "after consultation with Thomas the price given to Thomas was $50,000, so as to offer a commission to myself and to Kappes." The commission, therefore, was $3700, the difference between $50,000 and $46,400.

The alleged ownership of Murphy was not disclosed until Fetzer's report had been shown to be false; and Murphy's

the benefit with [illegible] Brown [illegible] of the [illegible]; and [illegible] that the evidence shows that the [illegible] complainant has received such benefit, there is no evidence [illegible] the benefits with full knowledge [illegible] of the Trust, [illegible] cross complainants [illegible] which it may be inferred that the [illegible] cross complainant.

In the purchase of [illegible] there were six lots, [illegible]. Three purchases were recorded by [illegible] Benjamin N. Trotter in the total amount of $36,[illegible]. He received two checks [illegible] one of [illegible] and the other [illegible]. The evidence shows that only $[illegible] the lots. All of the purchases [illegible] Title and Trust Company [illegible] total amount [illegible] account for the [illegible] purchased [illegible] instead of $36,[illegible] damages [illegible] consideration [illegible] why, and a receipt [illegible] itself that [illegible] Thomas was $38,[illegible] Kasper." The complainant, [illegible] between $[illegible] and $[illegible].

The [illegible] until Kasper's report had been shown to [illegible]

receipt was dated two days after Fetzer's report of the purchase. In order to conceal the $8100 included in the $46,300, a second escrow had been filed with the Chicago Title and Trust Company increasing the deposit of one of the real vendors named Bilek from $6400 to $14,500, and directing the Chicago Title and Trust Company to pay the difference of $8100 to Murphy. This second escrow was signed by Flemming, a clerk in Fetzer's office, in the name of Trotter and not by Bilek himself. Pursuant to directions, the Chicago Title and Trust Company paid the $8100 to Murphy, who endorsed it to a man named J. J. Risdon, who was connected in business with the cross complainant and who was associated with Fetzer in many of the purchases of property for the cross complainant. Fetzer testified that Risdon "most always" owed him money.

We are of the opinion that Fetzer has not honestly accounted for the deficit of $10,650 in the transaction in question, namely, the Trotter purchase; that he should not be allowed any commissions for the purchase, and that he should pay to the cross complainant the amount of the deficit, that is $10,650.

In the purchase of property known as the Edgerton purchase there was one lot. Fetzer reported that he purchased this lot from William C. Edgerton, and gave his check to Edgerton for $12,500. Edgerton's receipt was returned by Fetzer for that amount. The check of Fetzer was payable to John C. Farwell, who purported to be attorney in fact for Edgerton. The check was endorsed by Farwell to the Chicago Title and Trust Company with directions to pay Nicholas J. Kremer $9000, and Farwell $2000 and $1500 respectively. Edgerton never had title to the lot. The escrow held by the Chicago Title and Trust Company, directing the payments to Kremer and Farwell, recited that the payments were to be made upon receipt of a warranty deed executed by Fridolin Baumgartner and Helena Baumgartner, his wife. The Chicago Title

and Trust Company issued checks to Kremer and Farwell. The check for $1500 to Farwell was endorsed to Fetzer and deposited in Fetzer's bank. When Fetzer's attention was called to the check on the trial, he said the check may have been given to him by Farwell "to pay some money that Farwell owed" him, "and it was not for commissions." Fetzer testified that he and Farwell had been associated in business transactions. Farwell testified that he did not know Edgerton; that he "must have been attorney in fact for him;" that he "must have" received the $12,500 for which he receipted as Edgerton's attorney in fact, but that he did not know what he "did with the money." In regard to the $2000 check issued to Farwell by the Chicago Title and Trust Company, Farwell testified as follows: "If endorsed by me I must have gotten the money. For what I don't remember." As to the check for $1500 paid to Farwell by the Chicago Title and Trust Company, and endorsed by Farwell to Fetzer, the testimony of Farwell was as follows: "It may be that the $1500 was a repayment of original deposit." Kremer, a clergyman, testified that if the transaction was "the Baumgartner property" he remembered "their having some money put in escrow for them;" but that he "never received any money from anyone and no money passed through" his hands; that he "was simply helping out his parishioners."

We are of the opinion that in the transaction in question, namely, the Edgerton purchase, Fetzer was guilty of fraud, and that the cross complainant, therefore, was entitled to the lot at its fair cash market value.

The estimated value of the lot on the basis of the other lots in the same block was $4000. No evidence was offered by Fetzer as to the value of the lot. The difference between the estimated value of the lot, $4000, and the price reported by Fetzer, $12,500, was $8,500. We think that Fetzer should pay to

the cross complainant the deficit of $8,500.

In the purchase of the property known as the Matthews purchase there were five separate lots. Fetzer reported the purchases of the lots in a single purchase from Charles E. Matthews, a dummy, for a total amount of $77,500; and returned Matthews' receipt for $77,500 as a voucher. The real vendors received only $63,350. Two checks of Fetzer were made out for the $77,500, one check for $7500 and the other for $70,000. The check for $7500 was payable to Arnold H. Brantigan and endorsed "Charles Matthews, Arnold H. Brantigan, Joseph B. Flemming." This check was paid into the account of Flemming, who was Fetzer's clerk. The check for $70,000 was endorsed by Matthews; and Fetzer testified that his "guess would be that the check" was deposited to his account. The titles to two of the lots, owned respectively by parties named Ward and Kreger, were never held by Matthews, but Fetzer included those lots in Matthews' receipt. The Chicago Title and Trust Company held the escrow in the Kreger transaction; and the escrow shows that Fetzer's check for $35,000 was deposited with instructions to pay Kreger $21,500, and John C. Farwell $2000 and $11,500 respectively. The $2000 was paid by the Chicago Title and Trust Company by check to Farwell; and Farwell endorsed the check to Fetzer, and Fetzer deposited it in his bank.

In the purchase in question, namely, the Matthews purchase, the deficit was $14,150. Fetzer admitted that the real vendors did not receive $77,500, the amount he falsely reported as having been paid for the lots. He attempted to explain the deficit, but in view of the undisputed facts which we have stated in regard to the transaction, we do not think that his explanation should be accepted as true. His testimony was as follows: "In the Matthews transaction I paid Brantigan my check for $7500; Yeager [one of the real vendors] $6,200; Farwell $35,000; Kraemer [one of the real

[illegible]

vendors] and Flemming together $26,000; Matthews my check for 7380 for $150; and then I gave Peters my check 7377 for $4500, of which Peters gave me $1250 in the transaction by error, and so it made a net loss of $850."

It follows from the views we have expressed in regard to this transaction, the Matthews purchase, that Fetzer should be required to pay to the gross complainant the amount of $14,500.

In the purchase of property referred to as Block 25 there were five separate purchases. In three of the purchases there were deficits between the amounts actually paid to the vendors and the amounts reported as paid by Fetzer. The total of the deficits was $2,050. Fetzer accounts for this amount by claiming commissions for the same amount. As we have previously stated, that in our opinion Fetzer should not be allowed any commissions at all, it follows that Fetzer should pay to the complainant the sum of $2,050.

In the purchase of property known as the Kellogg purchase, there were two parcels of land. One of these Fetzer reported as having cost $27,000 when in fact only $25,000 was paid to the real vendor. In this transaction the Chicago Title and Trust Company returned by check to Fetzer's firm $2000. In passing upon the vouchers in the transaction Kappes approved the check.

In the purchase of property known as the Harris-Ballard purchase Fetzer reported the cost at $42,000. The price actually paid the vendor was $40,000. In this transaction Kappes approved a check for $2000 payable to Fetzer's own firm. Furthermore, the contract for the purchase of the property in this transaction was drawn by Kappes and recited that the purchase price was $40,000.

In the purchase of property known as the Carpenter-Fairbanks purchase Fetzer reported the cost of the property at

[illegible]

[illegible]

[illegible]

$27,500. The vendor received only $25,500. In this transaction a check for $2000 was returned by the Chicago Title and Trust Company to Fetzer's firm. Kappes approved the check.

In the purchase of the property known as the Cummings property Fetzer reported the cost of the property at $32,750. The price paid the vendor was $33,000. In this transaction the Chicago Title and Trust Company returned by check to Fetzer's firm $1750. Kappes approved the check.

In the above four purchases, namely, the Kellogg, Harris-Ballard, Carpenter-Fairbanks, and Cummings, the total deficits amounted to $7,500. Fetzer claims that this amount was due to him for his commissions. As we do not think that he is entitled to any commissions, we are of the opinion that he should be required to pay to the complainant the sum of $7,500.

The question whether Fetzer should be credited with the alleged payments by him to Thomas for "railroad purposes" is discussed at length by both counsel for the cross complainant and counsel for Fetzer. The total of the alleged payments for "railroad purposes" is $212,000. This amount is composed of the following items, to which we have previously referred: $60,000 in the Busse campaign; $40,000 in the Cobb purchase; $50,000 in the Keller-Hafer purchase; $17,200 in the Gilchrist purchase; $14,800 in the Peters purchase. The only testimony as to these alleged payments for "Railroad purposes" is the testimony of Fetzer. The specific railroad purpose for which any one of the alleged payments was made was not stated by Fetzer, except as to the alleged payment of $60,000 for a contribution to Busse's campaign fund; and with the exception mentioned there is no evidence whatever in the record to show the specific railroad purpose for which any of the alleged payments was made. According to Fetzer all of the payments to Thomas were made

in currency. The only evidence that the payments were made to Thomas, other than Fetzer's testimony, were certain notations on Fetzer's check stubs which, according to Fetzer, indicated that the payments were made to Thomas. The check stubs from November 6, 1906, to March 4, 1907, during which period Fetzer made three of the alleged payments to Thomas, were lost or destroyed after having been produced at the trial. It may be stated in passing that during this period from November 6, 1906, to March 4, 1907, the evidence shows that Fetzer received from the cross complainant $715,000 for disbursement.

The alleged payments to Henley for "railroad purposes" were made, according to Fetzer, by check. There is, however, no evidence whatever except Fetzer's testimony that the payments were made for railroad purposes. In our previous discussion of the payments to Thomas and Henley, in connection with specific purchases, we have stated the amounts of the payments in lump sums, which were testified to by Fetzer. But Fetzer's testimony also shows that some of the payments were not made in lump sums, but that the lump sums represented the total of separate payments in smaller amounts. According to Fetzer's testimony the amounts of the payments ranged from $200 to $50,000 and covered a period from February 4, 1907, to July 7, 1908. When the payment on the latter date was made Thomas had ceased to be president of the cross complainant. The question arises as to what possible railroad purpose, on behalf of the cross complainant, Thomas could have applied that amount, after he had ceased to be president of the cross complainant.

A summarized statement, according to Fetzer's testimony of the amounts of the payments, the dates of the payments, and the notations on the check stubs in regard to the payments, exclusive of the $60,000 for the Busse campaign fund, is as follows:

in [illegible]. The only evidence [illegible] Thomas, [illegible] Peter's testimony, [illegible] payments were made to [illegible] 1906, to March 4, 1907, [illegible] the alleged payments [illegible] having been produced [illegible] that during this period [illegible] the evidence [illegible] $375,000 for [illegible].

The [illegible] "[illegible]" were [illegible] over, no evidence [illegible] were [illegible] of the payments [illegible] performance, [illegible] which were [illegible] by Peter. [illegible] shows that [illegible] that the [illegible] earlier [illegible] the payments range [illegible] February 4, 1907, [illegible] date was [illegible] planned. [illegible] amount, [illegible]

[illegible]

of the [illegible] notations on his [illegible] of the $375,000 [illegible]

Alleged Payments to Thomas for "railroad purposes."

Febr 4, 1907,	$3,000	Payable to currency. Endorsed Joseph B. Flemming. Initials "B.T." on list of lost stubs.
Febr 11, 1907,	6,000	Payable to currency. Initials "B.F.T." on list of lost stubs.
Febr 15, 1907,	6,000	Payable to currency. In blue pencil in circle "W.T.F." On list of Lost stubs initials "B.F.T."
March 14, 1907,	30,000	Payable to currency. Endorsed John C. Fetzer.
March 27, 1907,	30,000	Payable to Edgar R.Cobb. Endorsed by Cobb and bears stamp of Nat.Bk. of the Republic
Nov. 7, 1907,	1,000	Check to currency, endorsed John A.Chea, stub marked "B.T."
Nov. 7, 1907,	1,000	Currency Green check. Stub marked "B.T."
Nov. 11, 1907	500	Order of Edward H. Peters.
Nov. 12, 1907,	500	Payable to order of Nelson M.Lambert. Stub marked "B.T."
Nov. 15, 1907,	5,000	Order of and endorsed by J.B.Fleming. Stub marked "currency B.T."
Nov. 16, 1907,	900	Order of T. McGough; stub marked "Currency B.T."
Nov. 16, 1907,	500	Payable to Edward H.Peters, Stub marked "E.H.Peters, currency B.T."
Nov. 18, 1907,	4,000	Sol Klein check for $10,200 (343,928, 1125).
Nov. 30, 1907,	3,400	Check payable to Joseph B. Fleming.
Dec. 7, 1907,	3,000	Payable to Edward H.Peters; stub marked "currency B. T."
Dec. 7, 1907,	4,000	Payable to Sol. Klein.
July 7, 1908,	3,000	Order of B. Thomas.
No date is shown for this payment,	200	Currency without check mentioned by Fetzer.
Total to Thomas.....	$122,000	

Allowed [illegible] by Congress in "National Emergency."

Feb. 4, 1907.	[illegible]	[illegible] Leonard [illegible] 8. [illegible] Additional [illegible] on list of [illegible].
Feb. 11, 1907.	[illegible]	[illegible] Lieut. [illegible] on list of [illegible].
Feb. 18, 1907.	[illegible]	[illegible] Lieut. [illegible] on list of [illegible].
March 14, 1907.	[illegible]	[illegible] Leonard [illegible].
March 27, 1907.	[illegible]	[illegible]
Nov. 7, 1907.	[illegible]	[illegible]
Nov. 7, 1907.	[illegible]	[illegible]
Nov. 11, 1907	[illegible]	[illegible]
Nov. 12, 1907.	[illegible]	[illegible]
Nov. 13, 1907.	[illegible]	[illegible]
Nov. 16, 1907.	[illegible]	[illegible]
Nov. 16, 1907.	[illegible]	[illegible]
Nov. 16, 1907.	[illegible]	[illegible]
Nov. 30, 1907.	[illegible]	[illegible]
Dec. 7, 1907.	[illegible]	[illegible]
Dec. 7, 1907.	[illegible]	[illegible]
July 7, 1908.	[illegible]	[illegible]
No date [illegible] for this payment.	800	[illegible]

Total [illegible]
[illegible]..... [illegible]

Alleged payments to Henley for "railroad purposes."

Mch. 14, 1907	$10,000	Payable to Wm. J. Henley, endorsed to "S.T.Murdock, Wm. J. Henley. Draft payable to order of W. J. Henley. S. T. Murdock."
Mch. 29, 1907,	10,000	Payable to order of W.J.Henley. Endorsed by Henley. Stamp is Union Trust Co.
May 9, 1907,	5,000	Payable to order of W. J. Henley. Endorsed by Henley. Stamp of Union Trust Co.
Nov. 1907	5,000	C. & W. I. 4% bonds.

Total to Henley $ 30,000

Total to Thomas and Henley $152,000.

Adding to the total of $152,000 the amount of $60,000 for the Busse campaign fund, we have a final total of $212,000.

Counsel for Fetzer maintains that the evidence does not show a conspiracy between Fetzer and Thomas to defraud the cross complainant; that Fetzer's testimony as to the payments to Thomas for "railroad purposes" is true, and that there is evidence which corroborates his testimony.

Counsel for Fetzer further contends that the payments to Thomas were not unlawful diversions of the funds of the cross complainant; that Fetzer was justified in making the payments, and that Fetzer's account should be credited with the amounts of the payments.

The task which confronted counsel for Fetzer was so difficult that, in our opinion, it could not be accomplished. We think, however, that counsel for Fetzer has presented Fetzer's side of the controversy with as much skill and force as it could be presented in the circumstances. The contentions of counsel for Fetzer which are argued elaborately and emphasized by frequent repetition, may be stated substantially as follows: That the evidence shows that Thomas was the "dominating spirit," "practically czar" of the cross complainant, in fact the cross complainant itself; that with full

Alleged payments to Hanley for "railroad purposes."

Mar. 21, 1907	$50,000	Transfer to Co. A. Hanley, referred to "A.A.Hanley", "A. C. Hanley", "Hugh Hanley to apply on A. C. Hanley." C. C. Anderson.
Mar. 28, 1907.	10, 00	Payment on order of A. C. Hanley, cashed by Hanley. Check to United States.
May 8, 1907.	5, 00	Transfer to account of A. C. Hanley, referred to Hanley. Check of United States.
Nov. 1907	[illegible]	[illegible]
Total to Hanley	$ [illegible]	
Total to Thomas and Hanley	$[illegible]	

Adding to this [illegible] the amount of [illegible] for the broad gauging [illegible] total of [illegible]

Answer (1) Return [illegible] the [illegible] are not given a satisfactory reason [illegible] complainant; [illegible] for "railroad purposes" [illegible] correspondents [illegible]

Answer (2) Return [illegible] to Thomas were not entirely [illegible] complainant; [illegible] that Tatman's account should be [illegible] payments.

[illegible] difficult that, in our opinion, [illegible] think, however, that [illegible] of the contracting [illegible] marked in the [illegible] which are [illegible] can be stated [illegible] Thomas was the "[illegible]" [illegible] complainant, [illegible]

knowledge of the officers, directors and stockholders of the cross complainant, Thomas had for years "caused irregular vouchers to be made and cashed by or through his subordinate officers and agents so that cash would be available for his use without requiring a record of its actual use to be made upon the books" of the cross complainant; that these vouchers would be charged to various funds of the cross complainant, such as the "track elevation" fund and "legal expenses" fund; that some of these vouchers were issued to obtain funds for political contributions; that Fetzer "does not claim to have had any personal knowledge" of this power and practice of Thomas, but that Fetzer "knew" by general repute that Thomas "ran the company." Counsel for Fetzer then continues his argument by maintaining that not only was this general power and this general practice of Thomas shown by the evidence, but that there was a "particular occasion during the period of Mr. Fetzer's dealings" where this power and practice generally exercised by Thomas, in respect of the issuing of irregular vouchers to obtain money for railroad purposes could have been employed; that this "particular occasion" existed in the fact that a bill known as bill 777 was pending in the legislature of the State of Illinois, which, although of a general nature, was actually intended as remedial legislation to cure an alleged defect in a bond issue of the cross complainant in the amount of $50,000,000; that Henley was in charge of securing the passage of bill 777; that the evidence shows that while the bill was pending Fetzer, at the direction of Thomas, paid Henley $30,000 to be used for "railroad purposes;" that the bill was passed; that it is not contended that money was used corruptly to secure the passage of the bill; that money could have been used lawfully for "honest publicity, employment of able counsel to press legitimate arguments to committees, the collating of similar laws in other jurisdictions;" that the evidence, however, shows clearly that money was used legitimately or

illegitimately to obtain the passage of the bill; that Fetzer did not know any "of these things" in respect of the bill at the time of its pendency or passage.

The conclusion which counsel for Fetzer draws from his argument, as we have attempted to outline it, is that Fetzer's testimony "that he was told by Benjamin Thomas that the money should be paid to Thomas or to Henley, and that it was to be used for railroad purposes" was "convincingly" corroborated by the evidence.

Counsel for Fetzer also reaches the conclusion that the money, or a large part of the money, alleged to have been paid by Fetzer to Thomas and Henley for "railroad purposes" was used to obtain the passage of bill 777. This conclusion is thus stated by counsel for Fetzer: "The corroboration, however, goes much further and is, we respectfully submit, as convincing as circumstantial evidence can be that such money or a large part of it, was in fact used whether legitimately or illegitimately, is a matter of conjecture, to obtain the passage of Bill 777." The implication of the entire argument of counsel for Fetzer in regard to the alleged payments for "railroad purposes" is that Fetzer had the legal right to rely on Thomas' statement to him that the money was to be used for "railroad purposes," although it is expressly alleged by counsel for Fetzer that Fetzer had no knowledge of the power and practice attributed to Thomas in respect of the issuing of irregular vouchers, and also had no knowledge of the pendency or passage of bill 777.

We are of the opinion, however, that even if it be granted that the testimony of Fetzer that Thomas told him the money was to be used for "railroad purposes" was corroborated, Fetzer had no legal right in the circumstances to rely on the statement of Thomas or to give him the money for alleged "railroad purposes." The evidence does not show a single instance, except in

the case at bar, where Thomas ever diverted to another and different purpose funds of the cross complainant which had been devoted to a specific purpose, and directed that the funds so diverted should be concealed in a false report to the cross complainant. Although Thomas may have been the "dominating spirit" and "a czar" in the exercise of his powers as president of the cross complainant, he was not a dictator of absolute authority. The rules of law defining and controlling the implied powers of presidents of corporations were not suspended or disregarded as between Thomas and the cross complainant. Counsel for Fetzer does not contend that Fetzer had actual knowledge of a course of dealings between Thomas and the cross complainant, which would have justified Fetzer in believing that Thomas had the power to receive from Fetzer money to be used for "railroad purposes." In fact, counsel for Fetzer admits that Fetzer had no personal knowledge of the power and practice of Thomas in respect of directing the issuing of irregular vouchers for money used for "railroad purposes." And the rule is that if a person does not know of a course of conduct pursued by a party with whom he is dealing which would imply authority in such party to act in the deal, then the person cannot rely on such a course of conduct as a defense. Rawson v. Curtis et al., 19 Ill. 455, 474, 475; Merchants National Bank v. Nichols and Company, 223 Ill. 41, 50. The evidence shows that Fetzer knew that in the case at bar Thomas was not exercising uncontrolled authority. In his bill to set aside the award Fetzer alleged on information that the original contract between him and the cross complainant in regard to the purchases of property for the complainant was made "pursuant to a resolution of the Board directing Thomas 'to make such purchases of said property.'" And the evidence shows this to be a fact. Furthermore, in regard to one of the conversations between Thomas and him, Fetzer testified as follows: When I "was sent for to buy

the property, it was somewhat of a surprise, as I remember it now. Thomas said that the directors had taken it up and decided to go ahead at this time, but that they could not buy the Keller Coal Yard, the Hafer & Son Coal Yard, nor the Gorkery Coal Yard, but that they could purchase so much of the property as they could get for a reasonable price, but for the present I should keep north of 26th street." Again in respect of a letter which Thomas requested Fetzer to write in connection with the purchase of the Gorkery Coal Yards, Fetzer testified that he "understood that the purpose of it was to report to the board of directors the entire transaction in that vicinity." Also in the purchase of the Gorkery Coal Yards Fetzer was informed through the correspondence of Thomas and Kappes and Clark, the auditor of the cross complainant, that the board of directors had passed a resolution requiring the original receipts of vendors in real estate transactions with the cross complainant to be furnished to the auditor of the cross complainant. Fetzer also knew that in the purchase of the Gorkery Coal yards the auditor had refused to accept the receipts signed by Flemming and had demanded the receipts of the real vendors. As additional evidence that Fetzer knew that Thomas recognized the authority of the directors of the cross complainant, we refer to the efforts of Fetzer to obtain Delano's approval of and consent to the purchase of the Keller-Hafer Coal Yards. Moreover, the repeated and insistent demands of Thomas for money for railroad purposes, extending over a long period of time as testified to by Fetzer, should have made Fetzer doubt the truth of Thomas' statements that he needed the money for railroad purposes. One would suppose that in the circumstances, an inquiry would have arisen in Fetzer's mind as to what possible "railroad purposes" could require the expenditure of so much money. We can not believe that Fetzer was so credulous as to trust implicitly in

the statements of Thomas. Such credulity on the part of Fetzer would be wholly inconsistent with the shrewdness and business experience which the evidence shows he possessed. The fact is, however, that his own testimony indicates that he doubted whether Thomas' statements in regard to using the money for "railroad purposes" were true. In the Cobb purchase he testified that he took Cobb with him to the door of Thomas' office. In the matter of the Kensington and Eastern Railroad Company, his testimony shows that he did not consider the transaction an honest one. His testimony also shows that he refused to make the payments to Henley in currency; and that at times he hesitated about making the payments to Thomas.

We are of the opinion that the evidence is amply sufficient to establish the fact that Fetzer was put upon inquiry to ascertain Thomas' authority to receive the money alleged to have been paid to him and Henley for "railroad purposes."

Furthermore, as we have previously stated, we are of the opinion that the board of directors of the cross complainant did not know of the acts of Fetzer, Thomas and Henley in regard to the alleged payments of money for "railroad purposes." There is no evidence, either direct or circumstantial, from which such knowledge on the part of the directors may be inferred. On the contrary, the conduct pursued by the directors in ordering an investigation of the relations between Fetzer, Thomas and Henley in the various purchases, and in directing that the present suit be brought against them, are facts which should not be ignored in determining whether the directors had knowledge of the dealings of Thomas, Fetzer and Henley in regard to the alleged payments of money for "railroad purposes." It is highly improbable that the directors would have adopted the course that they did if they had had knowledge of and acquiesced in the fraud.

In regard to the argument of counsel for Fetzer relating to bill 777, we are of the opinion that the conclusion of counsel that the evidence shows that the money, or a large part of it, alleged to have been paid by Fetzer to Thomas and Henley for "railroad purposes" was used to obtain the passage of the bill, is wholly untenable.

Counsel for Fetzer does not contend that there is any fact or circumstance from which it may be inferred directly that the money, or a large part of the money, alleged to have been paid by Fetzer to Thomas and Henley, was used to obtain the passage of bill 777. Counsel for Fetzer draws that presumption only from circumstantial evidence which he says is convincing. The circumstantial evidence which counsel for Fetzer maintains is sufficient to justify the presumption is as follows: Delano wrote Thomas a letter in regard to bill 777, in which he said: "I believe we should in a quiet way, get the legislation which Judge Henley and our counsel concluded is desirable." Subsequently to the writing of this letter Morton D. Hull, a prominent member of the legislature, told Delano that he thought money was being used to secure the passage of bill 777. Delano told Hull that he was positive that money was not being passed. Delano spoke to Thomas about the matter and after Thomas had assured him that money was not being used, Delano took Thomas to see Hull, and Thomas made a categorical statement to Hull that no money was being used. Hull asked Thomas to write him a letter to that effect. Thomas wrote two letters to Hull explaining the nature of the bill. In the letters Thomas makes the following statements: "There is no reason why this explanation should not have been made when the bill was presented. There is nothing mysterious about the matter. It is not intended to and does not apply to any other railroad. The defect does not affect the ownership of the Railroad [the cross complainant] in any way. Henley will be in

Springfield and will be glad to confer with the Legislature in the matter. *** There was never any reason for secrecy in this matter, other than the fear that the securities of the company might possibly be affected in some way on account of a possible misapprehension on the part of the public of the reasons for asking for this validated act. Henley probably said nothing because of the above reason, which was a mistake, in view of what has transpired. The act has nothing to do with the Alton deal or any other. When you are satisfied, hope that you will use your best efforts to secure the passage of the bill. The only possible reason for any concealment whatever is explained above."

It will be observed that instead of the record showing by circumstantial evidence that the money, or a large part of the money, alleged to have been paid by Fetzer to Thomas and Henley, was used to secure the passage of bill 777, the record shows direct evidence to the contrary. But counsel for Fetzer maintains that Thomas' categorical denial to Hull should not be believed; in other words, to put it in plain language, that Thomas lied to Hull. There is no evidence whatever to justify such a conclusion; and furthermore, Thomas is corroborated by Delano's statement to Hull that money was not being used. Hull believed Thomas and Delano, and gave his support to the bill. Counsel for Fetzer, however, arbitrarily rejects the denials of Thomas and Delano; and maintains that the only legitimate inference from the phrase "in a quiet way," which Delano employed in his letter to Henley in regard to bill 777, was that money was to be used to obtain the passage of the bill. Delano explained that the only meaning he intended to convey by the phrase was that publicity should not be given to the defect in the bond issue lest the cross complainant might be "held up" in its efforts to get legislation; that "a mere statement telling about the matter would make it very much more difficult, perhaps, to get legislation, and open the door

to very serious trouble."

Counsel for Fetzer maintains that "it is unimportant whether Mr. Delano intended to advise Benjamin Thomas to have Judge Henley use anything more than proper methods to obtain this legislation; that "the question is what Mr. Delano, if he was a man of discerning mind, would have expected Judge Henley and Mr. Thomas to understand from such language." Expressing the insinuations against Thomas and Henley a little more clearly, counsel for Fetzer, after referring to Thomas and Henley as "intensely practical" men, states further "that whatever the real purpose in Delano's mind was, that his instructions, coupled with the habits and practices of the two officers of the appellant company, for whose instruction the letter was intended, amounted in their judgment at least to a full warrant for what they did."

Apparently counsel for Fetzer is expressing euphemistically what, in ordinary English, means that Thomas and Henley were men of low moral principles, and were so accustomed to use money corruptly that the only interpretation that they would place on the phrase, "in a quiet way," was that money was to be used corruptly in obtaining the passage of bill 777. The phrase, however, should be construed according to the meaning that men of customary morality would give to it, and when so construed we do not think that reasonably it would bear the interpretation counsel for Fetzer would have us put upon it. Moreover, it is the rule, as stated in McKennan v. Mickelberry, 242 Ill. 117 (p. 134), that "If the motives and designs of the parties charged with fraud or collusion may be traced to an honest and legitimate source as to a corrupt one, the former explanation ought to be preferred." We think that Delano's explanation as to what he intended by the phrase is a fair and reasonable one, and that the interpretation which counsel for Fetzer would have

us adopt, is a distorted and unreasonable construction.

In this view of the evidence it follows that there is no evidence whatever, whether circumstantial or direct, from which counsel for Fetzer may presume that the particular money alleged to have been paid by Fetzer to Henley for "railroad purposes" at the direction of Thomas, was used to obtain the passage of bill 777. The only method of reasoning by which counsel for Fetzer could reach such a conclusion on the evidence as we intrepret it, would be to base a presumption on a presumption; that is by presuming first that the pendency of bill 777 in the legislature presented a situation where money possibly might have been used to obtain the passage of the bill, and then from such presumption, further presuming that the particular money in question was used to obtain the passage of the bill. Such argument would be open to two objections: First, that the fact that any money whatever was used to obtain the passage of the bill is not clearly established by the evidence, and for that reason the presumption could only be that money possibly might have been used; and, second, that the presumption that the particular money in question was used to obtain the passage of the bill is based not only on a presumption, but on a presumption that is drawn from an unproved fact. Such reasoning is not permissible in logic, as it leads only to suspicions, not to probable conclusions. The rule is well settled that a presumption cannot be based upon a presumption. Globe Accident Insurance Company v. Gerisch, 163 Ill. 625, 629; Condon v. Schoenfeld, 214 Ill. 226, 229, 230; United States v. Ross, 2 Otto (U.S.) 281, 283, 284.

In the case of United States v. Ross, supra, the court said (pp. 283, 284): "No inference of fact or law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. The law requires an open,

visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. *** A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption."

A complete answer to the entire argument of counsel for Fetzer in regard to the alleged payments by Fetzer to Thomas and Henley for "railroad purposes," is that the evidence shows that Thomas, Henley and Fetzer were engaged in a conspiracy to defraud the cross complainant. As we view the evidence Fetzer gave money to Thomas and Henley but did not give money for "railroad purposes." The money, in our opinion, was given to Thomas and Henley for their own personal use, and was their share of the funds fraudulently obtained from the cross complainant in the conspiracy. The payments of the money to Thomas and Henley by Fetzer constitute part of the evidence of the conspiracy.

We do not deem it necessary to enter into a detailed discussion of the evidence relating to the conspiracy. In considering the evidence in regard to the various purchases, we have already indicated our views as to the conspiracy. Furthermore, we have set out at great length evidence bearing on the question of the conspiracy. We will, however, call attention to one fact to which we have not referred, and which we think tends strongly to show the consciousness of guilt on the part of both Thomas and Fetzer; and that is the attitude of both Thomas and Fetzer towards Edward B. Pryor, a vice president of the cross complainant, who began the investigation for the cross complainant of the transactions of Thomas and Fetzer. According to Pryor's testimony, Thomas refused to give him any information; and Fetzer made false statements as to his check stubs. Pryor's testimony, as quoted from the

[illegible]

[illegible]

[illegible]

abstract, was as follows: "I made an investigation as to the cost of these subsequent purchases made in 1907, at the request of Mr. F. A. Delano, the President of the Wabash Railroad Company [the cross complainant] sometime in the fall of 1907. I went to the office of the Chicago & Western Indiana Railroad Company [the cross complainant] and told Mr. N. Thomas, the President of the Western Indiana [the cross complainant] that Mr. Delano had asked me to ascertain the average cost per square feet of these properties; and Mr. Thomas told me that he had made a report to the Board of Directors, which seemed to be satisfactory to everyone but Mr. Delano, and that he could not give me the information. Knowing that Mr. Fetzer had made the purchases, I went to his office and introduced myself to him. I had never met him before. I introduced myself as the fourth vice president of the Wabash Railroad Company, and told him that I had been to Mr. Thomas' office to get this information for Mr. Delano, but had not succeeded, and that I had come down to see him and see if he could give me the average cost per square feet. He said he thought he could do so, without any trouble. This was in Mr. Fetzer's office in Chicago. We went into Mr. Fetzer's private office and sat down at the flat topped desk, something like this (indicating), and I think there was another desk immediately at his right hand. I sat down at his left hand; and he got out a lot of stubs to checks, he took them out of a little compartment in his desk. My best recollection is that he unlocked the compartment and took these papers out of there, including a little memorandum book. I told him that if I could get the numbers of the lots and the front feet and the depth, that I could get the total number of square feet, and dividing that into the cost could get the average cost per square foot. At that time I had no knowledge of the cost. I had some memorandum - some blank paper there, and

Mr. Fetzer proceeded to give me the block numbers and the lot numbers. *** He also gave me the total cost, which I put down. In some instances he also gave me the names of the grantors or grantees and I think I put these down. **** He was referring to his check stubs from time to time as he gave me these amounts. He had these check stubs right out with the other papers. As he turned over these check stubs I noticed the name of Mr. Kappes and Mr. Thomas. After he had finished giving me the description of the property, I asked him if he had any objection to giving me or my making a list of the checks that he had given to Mr. Kappes, and he said no.*** When I saw the check stubs, one or more, with the name of E. Thomas, I said, 'What were those checks for that were in favor of Mr. Thomas?' He said, 'There were no checks there in favor of Mr. Thomas.' I said, 'Oh, yes, I saw three, one for $5,000, one for $10,000, and one for $25,000.' He said, 'They had nothing whatever to do with the Western Indiana [the cross complainant] matter. Mr. Thomas and I were interested in an outside deal.' I said, 'Is that true as to all of them?' He said, 'I know it is true as to one - I think it was the $5,000 check.' And I said, 'How did you keep that account with the Western Indiana? [the cross complainant]. Did you run it as an open account, and for a lump sum advance made to you, the same as was done in the Wabash?' He said, 'Yes.' I said, 'Then possibly some of there items were amounts that you returned to the Chicago & Western Indiana [the cross complainant] as not needed?' He said, 'That may be true as to two of them, but it was not as to one. I know that Mr. Thomas and I had an outside deal, and that, I think, was the $5,000 check.' I reached over and picked up the check stubs to go through them to see if that was all of the checks in favor of Mr. Thomas, but he reached over and took it away from me, and I did not press the matter at all, did not look into them at all.

And then I gathered all my papers together and went back to Mr. Delano's office and made my report to him."

From our opinion that Fetzer was guilty of fraud, it follows that he is not entitled to commissions in any of the purchases. According to our interpretation of the evidence, as we have previously stated, all of the purchases were made by Fetzer as agent of the cross complainant under one contract with the cross complainant; and the series of purchases were only parts of that contract. It is the well settled rule that an agent is allowed commissions only where he has rendered honest and efficient service. If the agent has been guilty of fraud against his principal, the agent forfeits his commissions. Hafner v. Herron, 165 Ill. 242, 247; Fish v. Seeberger, 154 Ill. 30, 34.

In the different purchases which we have discussed we have indicated deficits, respectively, as follows: Hanks purchase $30,000; Jennings-Barry purchase $94,650; Landers-Minton-Loesch-Flemming purchase $92,310; Corkery Coal Yards purchase $150,000; Cobb purchase $40,000; Keller-Hafer purchase $135,000; Gilchrist purchase $34,613; Lewins-Graves-McCauley purchase $15,240; Peters purchase $17,473; Trotter purchase $10,650; Edgerton purchase $8,500; Matthews purchase $14,150; Block 25 purchase $2,050; Kellogg purchase $2,000; Harris-Ballard purchase $2,000; Carpenter-Fairbanks purchase $2,000; Cummings purchase $1750. The total amount of these deficits is $662,391. We think that interest at five per cent. should be computed on the amount of each deficit from the date that Fetzer made his final report in the purchase corresponding to the deficit, to the date of the entry of the judgment in this court.

The cross bill of the cross complainant alleges that Thomas and Kappes have paid to the cross complainant the sum of $76,000. As the evidence shows that all of the moneys that

and Kappes obtained in the various transactions were received by them from Fetzer, we think that the account of Fetzer should be credited with the $76,000. Deducting this amount from $652,391, the total amount of the deficits, there remains the sum of $576,391.

It follows from the views that we have expressed that Fetzer should pay to the cross complainant the sum of $576,391 with interest at five per cent. computed as we have indicated.

We are of the opinion that all of the costs should be taxed against Fetzer.

The decree of the trial court is reversed except as to the part directing Fetzer to pay to the cross complainant $25,000, and as to that part it is affirmed; and the cause is remanded with directions to the trial court to enter a decree in favor of the cross complainant, the Chicago and Western Indiana Railroad Company, in the sum of $576,391, with interest computed as we have indicated.

AFFIRMED IN PART; REVERSED IN PART,
AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

119 - 29939

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JOSEPH CLANCY,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

240 I.A. 635

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the defendant, Joseph Clancy, from a judgment of the Criminal court of Cook county, on a verdict of the jury finding him guilty of conspiracy and fixing his punishment at imprisonment in the county jail for the term of six months. This writ of error has been consolidated for hearing with the writ of error No. 29940 prosecuted by Dan Sasson from the judgment of the Criminal court of Cook county on a verdict of the jury finding him also guilty of conspiracy and fixing his punishment at imprisonment in the county jail for the term of six months. The two cases may be considered together and what we say in the present writ of error will apply to the writ of error No. 29940.

The defendant, Joseph Clancy, was indicted with Dan Sasson and other persons, whose names were unknown to the Grand jurors, for conspiring to coerce unlawfully persons engaged in the sale and distribution of candy and confectionery into joining an organization known as the Candy Drivers' and Salesmen's Union.

The errors assigned by the defendant are (1) that the trial court erred in denying the motion of the defendant for a bill of particulars; (2) that the evidence does not show that the defendant is guilty beyond a reasonable doubt; (3) that the trial court erred in ruling on the admission and rejection of evidence.

The indictment contained 19 counts. We think it sufficiently informed the defendant of the charge of which he was accused. The indictment specifically named the persons whom it is alleged the defendant attempted to coerce, and also alleges that the coercion was attempted by injuring the property of these persons. The rule is well settled that whether the State shall be required to furnish a bill of particulars on the motion of the defendant rests in the sound legal discretion of the court; and that "it is only in cases where it is clear that there has been an abuse of this discretion that the denial of such motion is held to be error." People v. Munday, 280 Ill. 32, 50; DuBois v. The People, 200 Ill. 157, 164. We do not think that the court abused its discretion in denying the motion in the case at bar.

In discussing the sufficiency of the evidence counsel for the defendant contends that the evidence does not show that the defendant conspired to do the acts charged against him, and that the evidence shows that the injury to the property of the persons mentioned in the indictment was not committed by the defendant or by his direction, but by unknown parties who had no connection with the defendant.

The indictment charged that as part of the conspiracy the defendant injured the motor trucks of the following persons: Ralph W. Davis, Clarence P. Herdrich, Emil Soller, Frank Amborski, Charles L. Johnson, Theodore O. Dost and George Greub.

The evidence shows that all of these persons were in the candy business and owned their own trucks or automobiles; that the defendant tried to induce them to join the Candy Drivers' and Salesmen's Union; that when they refused to join, their motor trucks were injured shortly after their refusal by unknown parties.

The following testimony was given on behalf of the People:

Ralph W. Davis testified that he was a candy jobber and that he knew the defendant; that while he was carrying a bundle of goods from a store to his motor truck the defendant Clancy came up to him and asked him when he was going to join the Union; that he, Davis, said "Never;" that Clancy held up his hand as a signal, and as he did so "a bunch of men came over with him from a big touring car standing on the other side" of the street; that as he was putting the goods in the truck, Clancy started to talk to him about joining the Union, telling him that he would have to join the Union before he, Davis, "moved from that spot;" that he pushed Clancy to one side and told Clancy not to bother him; that the men stepped away from the head of the truck; that he, Davis, asked a policeman for protection, requesting the policeman to watch his truck while he went to get the rest of his goods; that when he got his goods the policeman was gone; that there was a crowd around the front of his truck; that he could not pull out the choke line to give gas to start out; that he looked at the inside of the hood and noticed that somebody had pulled the choke and gas line out of plumb and that he could not start; that he noticed that the radiator had been choked or marred in two places; that Clancy came over to him and said, "You see, we are able to take care of harder eggs than you are;" that Clancy also said that he, Davis, had better not leave until he had paid the money to join the Union; that he, Davis, finally started his truck and drove half a block, and when he stopped a big touring car stopped right in front of him and a couple of men got out; that Sasson was one of them; that two plain clothes men from the Maxwell street station came there and that he, Davis, drove away.

Clarence F. Herdrich testified that he was a wholesale candy jobber; that he knew the defendant Clancy; that he had a conversation with Clancy in which Clancy asked him if he "had already

signed up;" that he, Herdrich, said he intended to "sell his route," that he did not care to sign up that week; that Clancy said, "Well, you better get in before next week; you better get in or you will be up against it;" that he, Herdrich, drove in his automobile to a jobbing house; that two men stopped him, but he did not wait for them and went into the store; that he stayed in the store about an hour; that when he came out and got into his automobile he found that three tires were punctured.

Emil Boller testified that he was a jobber in the confectionery business; that while he was buying goods in a store he met the defendant Clancy; that Clancy said he was the president of the Candy Wagon Drivers and Salesmen's Union; that Clancy asked him whether he "wanted to sign an application;" that he, Boller, said he was not prepared to join a union as he had been conducting his own business for the past sixteen years; that Clancy said, "Don't you think it is a good thing?" that he, Boller, said, "I have not considered it;" that about a week later he met Clancy at the same place and Clancy said, "Didn't you sign an application for the local?" that he, Boller, said "No;" that again about a week after he, Boller, stopped in front of a store and three men came up and asked him if he "was ready to sign an application," and pay them $10; that he said, "No;" that the defendant Sasson was one of the three men; that one of the men tapped him, Boller, on the shoulder and led him around to the back end of the car; that as soon as he, Boller, had turned his back he heard a whistling sound; that when he looked he saw a man walking away from the right tire of the car, and that the tire was punctured.

Frank Amborski testified that he knew the defendant Clancy; that he met Clancy when he, Amborski, was coming out of a store with candy; that when he, Amborski, was driving away in

his car he was followed by men in two or three cars; that one of the cars "nosed" him off to the curbstone; that fifteen or eighteen men jumped out of the cars; that one of the men said, "Well, Amboraki, are you going to join the Union?" that he, Amboraki, said he was not in condition to join; that the man said, "You better cough up $10.50 or it will cost you $100 or $150 to get away from here;" that the man told him to go back to the store and get $10.50; that he, Amboraki, went back to the store, got the money, and Clancy and Sasson came up and one of them asked if he had the $10.50; that he gave Clancy a check for $10.50 and Clancy gave him a receipt for an initiation fee and three months' dues in the Candy Drivers' and Salesmen's Union.

Charles L. Johnson testified that he was a candy jobber; that while he was in front of the store of a candy dealer the defendant Clancy came over and asked him about joining the Union, saying, "Today is the day, they have all signed up but you;" that he, Johnson, said, "As soon as I find out they have all joined, why, I will too, but not today;" that just about this time several police officers stepped up and told Clancy to quit bothering him; that when he, Johnson, drove away in his truck a machine pulled in front of him and several men got out and wanted to know if he was going to join the union; that he drove away and the car again pulled up in front of his truck and forced him to the cubb; that a man jumped out of the machine and smashed the radiator of his, Johnson's, truck.

Theodore O. Dost testified that he was a jobbing confectioner; that just as he got out of his machine in front of a candy store Clancy and Sasson and three or four other men came up to him; that Clancy said, "Dost, I want you to join the Union this afternoon;" that he, Dost, said he would not join the Union; that Clancy said, "You better join this afternoon or you will get into

trouble;" that if he did not join today it would cost him 25 a week; that he, Dost, went into the store, left through a side door, got a car and drove to the Desplaines street station and asked for protection.

George Greub testified that he is a wholesale jobber; that while he was at a jobbing house he met Clancy, the defendant, who asked him to join the Union; that he, Greub, refused and drove to another jobbing house, and that Clancy and Sasson were there together with four or five other men; that they surrounded him and wanted to know if he would sign the paper; that he refused; that he then drove to another store; that after leaving this store Clancy and another man blocked him; that Clancy asked him if he would sign the paper; that he refused and drove to another store; that while he was there Clancy and another man drove up; that he, Greub, saw a man running to his car; that he, Greub, rushed out to get him, but by that time the man had cut the radiator of his, Grueb's, machine in two places.

Six other witnesses gave testimony on behalf of the People similar to the testimony of the witnesses above cited.

There is no evidence on behalf of the defendant. An offer of certain evidence was made on behalf of the defendant, but the court sustained an objection to the offer. We will consider later the question in regard to the ruling of the court.

We are of the opinion that the evidence shows beyond a reasonable doubt that the defendant was guilty of a criminal conspiracy to force certain persons to join the Candy Drivers' and Salesmen's Union. It is immaterial whether the evidence shows that the defendant himself actually committed the injuries to the trucks and automobiles. The evidence clearly establishes the fact that these injuries were part of the conspiracy in which the defendant was engaged. The evidence shows a clear connection

trouble; that if he did not pay it [illegible] he [illegible] a week; that he, Dent, went into the house, left through a side door, got a car and drove to the [illegible] street station and asked for protection.

George Grant testified that he is a stockholder [illegible] that while he was at a boarding house on [illegible] Street, the defendant, who asked him to join the Union, [illegible] and drove to another boarding house, and from Clancy and Brown were there together with four or five other men; that they [illegible] and he wanted to know if he would stick; [illegible]; that he then [illegible] Clancy and another man [illegible] he would sign the pledge; [illegible] that while he was there [illegible] Brown, and a man running to his car; that he, [illegible] to get him, and [illegible] Grant's, [illegible].

His other witnesses gave testimony [illegible]

People similar to the testimony of the witnesses [illegible].

There is no evidence [illegible] an offer of certain [illegible] but the court [illegible] later [illegible]

[illegible] reasonable doubt [illegible] obtrusive [illegible] obtrusive to force [illegible] Gatewood's Union. [illegible] that the informants [illegible] trucks and automobiles, [illegible] that these injuries were part [illegible] Tribunal was engaged. The evidence [illegible]

between the conversations of the defendant with the owners of the trucks and automobiles and the injuries to the trucks and automobiles. The refusals of the owners of the trucks and automobiles to join the Candy Drivers' and Salesmen's Union and the injuries to their trucks and automobiles were not undesigned coincidences. The cumulation of the coincidences shows design.

In the case of The People v. Marx, 291 Ill. 40, the court said (p. 46): "A person who encourages the commission of an unlawful act cannot escape responsibility by quickly withdrawing from the scene."

In the case of Ochs v. The People, 124 Ill. 399, the court said (p. 422): "If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view of the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction, for every person entering into a conspiracy or common design already formed, is deemed, in law, a party to all acts done by any of the other parties before or afterwards, in furtherance of the common design."

Counsel for the defendant maintains that there is no evidence that the defendant entered into an agreement to do the acts charged against him.

In a conspiracy the unlawful agreement, independently of the overt act, constitutes the offense. (The People v. Blumenberg, 271 Ill. 180, 184.) But the general rule in regard to the proof of the corpus delicti is that it is not essential that the corpus delicti should be established by evidence independently of

between the conversations of the defendant with the owners of the trucks and makes [illegible] and the injuries to the trucks and automobiles. The refusals of the [illegible] to join the bakery drivers' and teamsters' union and the injuries to their trucks and automobiles were not without [illegible]. The cumulation of the circumstances seems forcible.

In the case of The People v. Mack, [illegible] Ill. [illegible], the court said (p. 49): "A person who encourages the commission of an unlawful act cannot escape responsibility by quietly withdrawing from the scene."

In the case of Gage v. The People, [illegible] Ill. [illegible], the court said (p. [illegible]): "If it be proved ... the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it, with a view to the attainment of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object. Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction, for every one who enters into a conspiracy or common design already formed, is deemed, in law, a party to all acts done by any of the other parties before or afterwards, in furtherance of the common design."

Counsel for the defendant [illegible] there is no evidence that [illegible] agreement to do the acts charged against him.

In a case [illegible] unlawful agreement, independently of the overt act, constitutes the offense. ([illegible] v. [illegible], [illegible] Ill. 14, 1906.) But the general rule in regard to the proof of the corpus delicti is that [illegible] that the corpus delicti could be established by [illegible] of

the evidence which tends to connect the accused with the offense. The same evidence which tends to prove one may also tend to prove the other, so that the existence of the offense and the guilt of the defendant may stand together inseparably on one foundation of circumstantial evidence. Carroll v. The People, 136 Ill. 456, 463.

Counsel for the defendant contends that the trial court committed error in allowing the witness James Boyle to state why he joined the Union. Boyle testified that a couple of men asked him to join the Union; that he told them he was undecided; that they said, "Well, don't try to turn a wheel until you sign up;" that after the men left the defendant Clancy came up and told him that he "better sign up," saying, "We can't waste any more time here. I am going to leave now; either sign up or we will have to let the boys take care of you;" that he, Boyle, borrowed some money and joined the Union. Boyle then testified that the reason he joined the Union was that he "wanted to continue in business that day and did not want to be delayed."

We do not think that the ruling of the court constituted prejudicial error. Boyle merely stated as his reason for joining the Union what was the obvious inference from the circumstances.

Counsel for the defendant contends further that the court improperly allowed the witness Elmer Meisterling to testify to matters which happened out of the presence of the defendant.

Meisterling testified that he was asked by the defendant Clancy to join the Union; that he told Clancy the business was his father's; that after Clancy left he, Meisterling, drove his truck to a wholesale crackerjack company, referred to as Rueckheim's; that he, Meisterling, left his truck and went in the store; that he saw two men going to his truck; that

the evidence [illegible]. The same evidence [illegible] the other, so that the evidence [illegible] the defendant may stand together [illegible] circumstantial evidence. [illegible] 463.

Counsel [illegible] court committed error in [illegible] state why he joined the union. [illegible] men asked him to join the union; [illegible] ciation; [illegible] said, "Yes, [illegible] you sign up;" that after [illegible] up and [illegible] any more [illegible] we will have to [illegible] borrowed some money [illegible] that the [illegible] time in business [illegible]

[illegible] attitude predisposed [illegible] for joining the union [illegible] circumstances.

Counsel [illegible] court [illegible] to [illegible]

[illegible] Teodoro [illegible] case was the [illegible] drove his truck to [illegible] as [illegible] to the [illegible] that he [illegible]

when he went back to the truck he found a tire flat and a gash in the tire; that he went back to Rueckheim's. Meisterling was then asked: "Q. What happened after that?" and he answered, "They called for protection." He was then asked, "Did the police come?" and he answered, "Yes." At this time neither of the defendants was present. We think, however, that is immaterial, as the evidence shows that the defendant was a co-conspirator with unknown parties, and therefore all evidence relating to the conspiracy would be admissible whether the defendants were present or not. We think that the evidence in question was part of the res gestae.

Counsel for the defendant objects further that the trial court erred in allowing the State's attorney to ask a leading question of the witness, Joseph Meyer.

We do not think the objection is well taken. The leading question was allowed to be asked after the recollection of the witness had been exhausted.

Counsel for the defendant further contends that the court erred in not sustaining an objection to the following testimony of the witness Yano Ricordati: "I saw Clancy ask Davis to pay $10 to join this. So, he did not want to join at that time. One of the sluggers said, 'Go ahead and jump the truck.' One of the fellows pulled out his hatchet and cut the radiator." Davis had already testified to the injury to the radiator of his car.

Counsel for the defendant does not indicate specifically the ground of his objection. We presume that his objection relates principally to the use of the term "sluggers." The trial court was not asked to strike the word from the record, nor to instruct the jury to disregard it. Furthermore, we do not think reversible error could be predicated on the use of the word in the circumstances.

Counsel for the defendant assigns error on the action of the court in refusing to allow the defendant to make the following proof offered by the trial attorney for the defendant: "I expect to show that in the month of September, A. D. 1922, there was a certain organization in the City of Chicago, named The Candy Jobbers' Confectioners' Association, that a committee from that organization called upon Mr. Fitzpatrick of the Chicago Federation of Labor to have him, along with Mr. Clancy and another Union man, to address the organization and explain to them what benefits they would derive from affiliating with the Chicago Federation of Labor *** in reference to forming an organization or union to be known as the Candy Drivers' and Salesmen's Union, and that Mr. Fitzpatrick, at the request of the Committee of the Candy Jobbers' Confectioners' Association on September 21, A.D. 1922, addressed such meeting in reference to the benefits that they would derive from affiliating with the Chicago Federation of Labor, and I expect to further show by this witness that there was an organization affiliated with the Chicago Federation of Labor known as the Candy Drivers' and Salesmen's Union, which superseded the Candy Jobbers' Confectioners' Association."

The trial attorney further offered to show that the Chicago Jobbers' Confectioners' Association had voted to enter the Union.

Counsel for the defendant states that the evidence was offered "to refute the charge that your plaintiffs in error were extorting money from these different individuals;" and counsel contends that "this testimony would entirely refute the charge of extortion as laid in the indictment and would show that each of these men so approached to join the Union had through their own association, by majority, agreed to go into the Candy Drivers' and Salesmen's Union.

We think that the evidence offered was irrelevant and immaterial. The evidence does not show, and the defendant did not offer to prove, that all of the persons whom the defendant attempted to coerce into joining the Candy Drivers' and Salesmen's Union were members of the Candy Jobbers' Confectioners' Association. Furthermore, even if they had been members of the latter association, there is no evidence that they constituted a part of the majority of the members who voted to join the Candy Drivers' and Salesmen's Union. Again, if they had constituted part of the majority who so voted, it is an undisputed fact that they were solicited by the defendant to join the Candy Drivers' and Salesmen's Union, and refused to join. In this state of the evidence it is wholly immaterial how they may have voted.

We are of the opinion that the judgment of the trial court should be affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

[illegible] that the evidence offered was inadmissible and immaterial. The [illegible] was done, and the defendants did not allege [illegible] that the [illegible] attempted to derive his [illegible] from the defendant's Union was merely [illegible] defendant [illegible] consultation. Furthermore, even if [illegible] of the letter [illegible] tion, there is no evidence [illegible] of the majority of the members the [illegible] to join the Union's "strike" and Salamanca's Union. Again, if [illegible] of the majority of the [illegible], it is [illegible] they were solicited by [illegible] to join the Union's "strike" and Salamanca's Union, and [illegible] it. In such [illegible] of the evidence it is [illegible] the [illegible] the trial court should [illegible].

[illegible]

Rutledge, [illegible]

4887a

2M 2-4-25

The People of the State of Illinois, defendant in error, v. Dan Sasson, plaintiff in error. Gen. No. 29,940.

Prosecution for conspiracy, verdict of guilty, and judgment and sentence thereon

Conc. Lee

ror to the Municipal Court of Chicago;
Superior Court of Cook county;
peal from the Circuit Court of county;
County Court of county;
Hon. , Judge, presiding. Heard
the Branch Appellate Court
this court at the term,
firmed upon authority of Gen. No. 29,939.
~~versed~~
~~versed and remanded with directions~~.
inion filed Rehearing denied
for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
ESIDING JUSTICE delivered the opinion of the court.

240 I.A. 635

error No. 29939 prosecuted by Joseph Glancy.

For the reasons stated in the writ of error prosecuted by Joseph Glancy, the judgment in the present writ of error of Dan Sasson is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

120 - 29940

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

DAN SASSON,
Plaintiff in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

240 I.A. 635

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by Dan Sasson from a judgment of the Criminal court of Cook County on a verdict of a jury finding him guilty of conspiracy and fixing his punishment at imprisonment in the County jail for the term of six months. This writ of error was consolidated for hearing with the writ of error No. 29939 prosecuted by Joseph Clancy.

For the reasons stated in the writ of error prosecuted by Joseph Clancy, the judgment in the present writ of error of Dan Sasson is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

180 - 30041

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN HENSEL,
Appellant,

vs.

L. F. GORMAN, MORGAN A. COLLINS,
et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I A. 635

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by John Hensel, the petitioner, from an order of the Superior court of Cook County, denying the right of the petitioner to a writ of mandamus against the defendants, L. F. Gorman, City Clerk, Thomas P. Keane, City Collector, Morgan A. Collins, General Superintendent of Police, William E. Dever, Mayor, and the City of Chicago, directing them to issue the transfer of the petitioner's retail beverage dealer's license for 1924 from the premises at 3334 North California avenue to the premises at 3361 Elston avenue, both avenues being thoroughfares in the city of Chicago.

The defendants have filed a motion to dismiss the appeal on the ground that the license in question has expired and that therefore the writ of mandamus would be unavailing.

We are of the opinion that the record shows a clear abuse of discretion on the part of the defendants in refusing to issue the transfer of the license in question; and that therefore the Superior court should have granted the writ. But as the license has expired we cannot direct the defendants to issue the transfer of the license since there is no license in existence.

On the authority of The People ex rel Mochan v. City of Streator, 258 Ill. 273, we are compelled to grant the motion of the defendants to dismiss the appeal.

Counsel for the petitioner contend that the case of People ex rel. Molchan v. City of Streator, supra, is directly in conflict with the following Federal decisions: Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498; Boise City Irrigation and Land Company v. Clark, 131 Fed. 415; United States v. Trans-Missouri Freight Association, 166 U. S. 290. Even if that were true, the rule announced in the case of People ex rel. Molchan v. City of Streator, supra, is the rule of decision that must be followed by us. In cases not involving the construction of the constitution, or laws of the Union, the decisions of the United States Courts are not binding as authority on state courts. Fuller v. Shedd, 161 Ill. 462, 494; Lebanon Bank v. Mangan, 28 Pa. St. 452; Doe ex dem. Shelton v. Hamilton, 23 Miss. 496, 498.

The appeal is dismissed.

APPEAL DISMISSED.

Matchett, P. J., and McSurely, J., concur.

271 - 30124

431a

PEOPLE OF THE STATE OF ILLINOIS
ex rel. John McIntyre,
Appellee,

vs.

WILLIAM E. DEVER, Mayor of the City of Chicago, THOMAS P. KEANE, City Collector, AL F. GORMAN, City Clerk, and MORGAN COLLINS, Superintendent of Police of the City of Chicago,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Relator, John McIntyre, filed a petition asking that the writ of mandamus be issued directing the Mayor of Chicago and the other respondents to grant him a license to conduct a retail beverage business at 2644 South Wells street, Chicago. Respondents answered denying that petitioner was a person of good moral character and reputation, and setting up that on December 22, 1924, police officers found petitioner in possession of intoxicating liquor on his premises for use in connection with his business in violation of the ordinances of the City of Chicago and the statutes of the State of Illinois, and that such facts having been presented to the Mayor, petitioner's license was revoked. Upon a hearing in the Superior court the writ of mandamus was issued. From this order respondents appealed, but petitioner does not appear in this court.

It is the well established law in this state that the writ of mandamus will not issue unless the petitioner shows a clear legal right to the writ or unless the party applying for it shows a clear obligation on the part of the party against whom the writ is sought to do the thing which the petitioner seeks to have per-

formed. It will not be awarded in a doubtful case, but only where the right of the relator is clear and undeniable and the party sought to be coerced is bound to act; also that the writ should not issue to control or review the exercise of the discretion of any state or municipal board or officer, where the act sought to be enforced is quasi-judicial in character, unless there has been a clear abuse of that discretion. It will only issue where there is an arbitrary abuse of discretion amounting to a denial of justice. Carpenter v. Dever, Appellate Court No. 29342-3, filed February 3, 1925; People ex rel. Heit v. City, Appellate Court No. 30130, filed December 14, 1925, and cases therein cited.

The undisputed evidence is that on December 2, 1923, police officers of Chicago visited the premises in question and found four customers at the bar and glasses on the bar of the kind used for a "wash" for whiskey; that as the officers came in the front door petitioner started to pour something into the sink from a bottle; that one of the officers smelled the bottle, which smelled like whiskey; that petitioner then ran through a side door and started to go upstairs; that the officer then compelled petitioner to open up a closet under the stairs and found two bottles, one of Port wine and the other of whiskey.

Under these circumstances, we are of the opinion that there was no abuse of discretion on the part of respondents in revoking petitioner's license on the ground that he had liquor on the premises in violation of the city ordinances and the state statutes. The writ of mandamus should not have been awarded, and the judgment of the Superior court is reversed.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

[illegible]

[illegible]

[illegible]

280 - 30133

PEOPLE ex rel. DANIEL LA BLANC,
Appellee,

vs.

WILLIAM E. DEVER et al.,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Relator, LaBlanc, filed his petition asking that the writ of mandamus issue against respondents ordering them to give him a license to conduct a public place of amusement at the premises known as 6346 Broadway, Chicago, Illinois, popularly known as the "Northern Lights Cafe." Answer was filed setting forth certain facts and averring that the revocation of petitioner's license was lawful and within the discretion of the officer charged with the issuance and revocation of licenses. Upon a hearing in the Superior court the writ of mandamus was ordered to issue, from which respondents appeal. Relator does not appear in this court.

It is the well settled law in this state that the writ of mandamus will not issue unless the petitioner shows a clear legal right to the writ or unless the party applying for it shows a clear obligation on the part of the party against whom the writ is sought to do the thing which the petitioner seeks to have performed. It will not be awarded in a doubtful case, but only where the right of the relator is clear and undeniable and the party sought to be coerced is bound to act; also that the writ should not issue to control or review the exercise of the discretion of any state or municipal board or officer, where the act sought to be enforced is quasi-judicial in character, unless there has been a clear abuse of that discretion. It will only issue where there is an

arbitrary abuse of discretion amounting to a denial of justice. Carpenter v. Dever, Appellate Court No. 29342-3, filed February 3, 1925; People ex rel. Heit v. City, Appellate Court No. 30130, filed December 14, 1925, and cases therein cited.

In appellants' brief the undisputed facts are stated that the Northern Lights Cafe was so conducted as to constitute a public nuisance and in violation of a number of ordinances of the City; that a "jazz" band, singing, and other noises were continued in the cafe until one or two o'clock in the morning, and frequently until four or five o'clock in the morning, disturbing the neighborhood and the tenants living in the nearby apartment houses; that the surrounding neighborhood is residential and that Loyola University is nearby; that women entertainers go around in the cafe from table to table, in violation of the city ordinance, and dance in unbecoming manner; that they were seen in acts of familiarity with the men; and that drinking from hip flasks was indulged in. It further appeared that on August 27, 1924, at about 2:15 o'clock in the morning, one of the entertainers was insulted and knocked down by one of the patrons, who was one of a number of gunmen headed by Louis Alterie; that there was a police officer, in citizens' clothes and unarmed, in the cafe that night, and when he remonstrated with the man who attacked the girl, the officer was struck and thrown out on the street; that when the police arrived there was a general shooting scene, in which one of Alterie's men was killed and one of the officers wounded by a shot. It was also shown that the premises had been closed for about a year by Federal court order, for selling intoxicating liquor; likewise that letters had been written by surrounding residents and the president of a business association to the Mayor, calling attention to the disreputable character of the cafe and asking that it be closed.

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It was incumbent upon petitioner, in order to be entitled to the license, to prove that he was a person of good moral character. Section 206, Chicago Municipal Code. No evidence was introduced tending to show this, and no character witness of any sort testified at the hearing.

Under the undisputed facts there was no abuse of discretion on the part of respondents in revoking petitioner's license. The writ of mandamus should not have been awarded, and the judgment of the Superior court is reversed.

REVERSED.

Matchett, P. J., and Johnston, J., concur.

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[illegible]

Bazabeth, [illegible] [illegible] [illegible] [illegible] [illegible].

330 - 30183

M. SCHREIBER, Doing Business as Federal Lamp Works,
Appellee,

vs.

THE FAIRPLAY CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover on account of defendant's alleged breach of contract in failing to accept and pay for goods ordered from plaintiff and also for goods, wares and merchandise sold and delivered for which defendant had not paid. Upon trial the jury found for plaintiff, who had judgment for $900.

Defendant, appealing, asserts that plaintiff commenced her action as a fourth class case in the Municipal court and subsequently by filing an amended statement of claim increased the amount claimed to over $1,000, and the case proceeded to trial as a first class case. For the court to transfer the case from a fourth class to a first class case is said to be reversible error. Holmes v. Straus, 283 Ill. 621. Plaintiff replies that there was no transferrence from one class to another; that regardless of the items of damage set forth in the amended statement of claim the ad damnum was never changed and that it was a fourth class case from start to finish and so tried without objection by defendant.

Upon referring to the abstract to ascertain the facts, we find nothing therein to support the contention that the case was transferred from the fourth class to the first class. The abstract does not tell us the class of the case, nor what the ad damnum was of the original or amended statement of claim. Under such circumstances, we will assume that the case was commenced and proceeded

to judgment in the proper class. The abstract must show matters relied on for reversal. Reviewing courts will not examine the record to find grounds for reversing. Kieshkowski v. Bostrom, 179 Ill. App. 73; Shreffler v. Fuller, 208 Ill. App. 630; Barber v. Mellish-Hayward Co., 209 Ill. App. 299; Detarding v. Illinois Central Public Service Co., 223 Ill. App. 374.

Plaintiff is in the business of manufacturing electric lamps, including small lamps for Christmas trees. In October, 1922, defendant gave plaintiff written orders for approximately 23,000 Christmas tree lamps. A considerable number of the lamps was delivered, but defendant alleges that on testing they were found to be so defective that it could not sell them to its Christmas trade, and thereupon it refused to accept any further deliveries and claims that to fill its Christmas orders it was compelled to go into the market and buy other lamps at a higher price.

Plaintiff introduced evidence tending to show that the lamps were not defective, but were of the kind usually manufactured and sold for this particular purpose; that in unpacking defendant mixed lamps of six volts with those of fourteen volts and tested them together, which was improper, as naturally the lamps of lower voltage would receive too much current and burn out. Plaintiff states that the lamps delivered were tested in her plant before shipment and worked properly. The evidence of plaintiff further tended to show that the lamps delivered were of clear glass and that defendant colored some of them; that the base of the lamps is made of composition soluble in alcohol; and that in coloring the lamps alcohol is used, which, if it comes in contact with the base, will naturally soften same. What are claimed to be fair samples of the lamps were introduced by plaintiff in evidence and are attached to the record before us as

exhibits.

The testimony of the witnesses is in direct conflict on many vital points. For instance, one witness for the plaintiff testified that she had a conversation with a representative of the defendant, who said that defendant was having difficulty in coloring the lamps and that it could buy lamps already colored from other sources for less than the cost of plaintiff's lamps. Defendant's representative denied that such a conversation occurred.

Whether the goods delivered reasonably complied with the contract of purchase and whether defendant was justified in refusing to accept the balance of the order was peculiarly for the jury to determine. Various points are presented which tend to discredit the probabilities of plaintiff's version, and this also can be said of defendant's evidence. In this uncertainty we must give weight to the opportunity of the jury to judge of the credibility of the witnesses by seeing them and observing their appearance and demeanor while testifying. Whatever might have been our opinion as jurors, as a reviewing court we can only reverse on the facts when we are of the opinion that the verdict is manifestly against the preponderance of the evidence. After considering the variant stories of the witnesses, we cannot say that the conclusion of the jury as to the facts was so clearly wrong that the judgment cannot stand.

Complaint is made with reference to the rulings of the court on the instructions. The instructions to the jury were oral, and they must be taken as a whole. Considering the instructions in this way, we are of the opinion that, while certain parts might be objectionable, yet taken altogether they contained no prejudicial error requiring a reversal.

The important question in the case is one of fact. The jury has decided against the defendant, and we are not

exhibits.

warranted in setting aside this conclusion.

The judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

39 - 30281

DAVID HAAS,
Appellee,

vs.

JOHN P. CRACRAFT and ROSE CRACRAFT, Doing Business as John P. Cracraft & Co.,
Appellants.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff and defendants are real estate brokers. Plaintiff was an employee of defendants and claims that under his contract of employment he was entitled to fifty per cent of $1575, which was commissions paid to defendants on the sale of certain real estate in Chicago. There have been two trials, in both of which the findings have been against the defendants. Plaintiff has received $157.50 and now has judgment for $630, the balance claimed by him.

The contract under which plaintiff was employed by defendants was verbal. He says he was to receive what was called a listing commission of ten per cent on any sale of property listed by him with defendants' office; if a sale was made by him he was to receive fifty per cent. In their affidavit of merits defendants denied that plaintiff was to receive fifty per cent commission on any deal consummated through his efforts unless it was with their knowledge and consent. Rose Cracraft, a defendant, testified that plaintiff was to receive fifty per cent on any customer he brought to the house to whom a sale was made, or fifty per cent "on any customer we turned over to him to work upon." John Cracraft, the other defendant, testified that plaintiff was to receive fifty per cent of the commission defendants received on sales plaintiff made to customers he originated "or customers

of the house that we turned over to him to sell."

Considering these slightly variant statements and construing the affidavit of defense as an admission that plaintiff was to receive fifty per cent of any commissions on a deal consummated through his efforts, defendants having knowledge of and consenting to the deal, the trial court was justified in holding in accordance with plaintiff's version.

Plaintiff had met a Mr. and Mrs. Christian, who were at several offices looking for desirable property with a view to purchasing the same. He also met them at defendants' offices shortly after he became employed there. Mrs. Christian came into the office and informed Mrs. Cracraft that they had found a piece of property they wanted and gave her the location. Mrs. Cracraft made some inquiries and later informed Mrs. Christian that the property was not for sale and could not be purchased. Afterwards plaintiff got in touch with the owner of this property and succeeded in bringing the owner's agent and Mrs. Christian together. Plaintiff reported this to Mrs. Cracraft. The owner and the Christians came to an agreement and a contract was executed which was consummated by the sale of the property to the Christians for $105,000.

There is no dispute as to these facts. Defendants made no attempt to secure this property for the Christians, but informed them that it was not for sale. It was due to the subsequent efforts of the plaintiff that the sale was made, and as it was made with the knowledge and consent of the defendants, plaintiff would be entitled to fifty per cent even under the admission in the affidavit of defense.

Upon the trial defendants sought to prove that at the time the deal was closed a dispute arose between them and the plaintiff about the division between them of the commission; that

plaintiff was claiming a listing commission of ten per cent of $315, on the total commission paid, $3150, which was divided equally among the defendants and the brokers for the seller, while Mr. Craeraft claimed that plaintiff was entitled to only ten per cent of the amount received by defendants, or $157.50; that it was finally agreed that defendants would give plaintiff $157.50, which was done, and put up the balance of his claim, or $157.50, in escrow. Plaintiff denies that such an agreement was made. He admits the dispute and says that this was finally ended by his taking $157.50, the balance of his claim to be settled subsequently either by suit or otherwise. Mellon, the agent for the seller, a disinterested witness, says that there was so much talk about the commission that he was not clear as to what amount, if any, was agreed upon. There is conflict in the testimony of the witnesses. The trial court, however, had the opportunity, which we have not, of seeing and observing them while testifying and was better able to pass upon their credibility than are we. We cannot say that its conclusion to accept plaintiff's story of this occurrence is so clearly wrong as to justify a reversal.

Complaint is made of the rulings of the court upon the evidence,but since the case was tried without a jury, errors in this regard,if any,are not sufficiently prejudicial to change the result.

The outstanding feature, which evidently commended itself to the trial court, was that after defendants would not proceed in helping the Christians to obtain the property they wanted, plaintiff on his own initiative became active and by his efforts and diligence brought them and the owner together so that the sale was consummated.

This case should not be tried a third time, and as the judgment is proper it is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

plaintiff was [illegible] a [illegible] one per cent of sales, on the total [illegible] sales, [illegible] among the defendants [illegible] Director's claims that [illegible] only one per cent of the amount received by [illegible] finally agreed [illegible] was done, and [illegible] sector. Plaintiff [illegible] mits the claims [illegible] §1257.80, the balance [illegible] by suit or otherwise. [illegible] corporated witness, says that [illegible] that he was not [illegible] There is conflict in the [illegible] however, had the opportunity, [illegible] ing them while testifying, [illegible] credibility than [illegible] plaintiff's story [illegible] a reversal.

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[illegible] to the trial court, [illegible] holding the [illegible] on his own [illegible] brought [illegible] judgment is proper if it [illegible]

Affirmed.

Matsuoka, P. J., and [illegible] concur.

45 - 30289

493

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

JACK O'MARA,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

240 I.A. 636

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

An information was filed charging defendant with cutting and damaging a certain automobile. He pleaded not guilty. Upon trial by the court he was found guilty and sentenced to three months imprisonment in the House of Correction and fined one dollar and costs. From this judgment he appeals. The sufficiency of the information is questioned. This is as follows:

> "Harry L. Cagney, a resident of the City of Chicago, in his own proper person, comes now here into court and in the name and by the authority of The People of the State of Illinois, gives the Court to be informed and understand that Jack O'Mara heretofore, on to-wit, the 15th day of February, A. D. 1925, at the City of Chicago, aforesaid, did then and there with felonious intent cut destroy and damage a certain automobile, the property of said Harry L. Cagney, in violation of Paragraph 432, Section 1, Chapter 38, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of The People of the State of Illinois."

Defendant says that this does not set forth specifically the crime charged, for the reason that Paragraph 432, Section 1 of Chapter 38, is concerned with malicious handling of lumber rafts, scows or boats. The State replies that this is a mere unimportant error, that the correct paragraph number is 439, and the number of the paragraph is mere surplusage.

A misstatement of a section of the statute may be considered as mere surplusage. Snell v. People, 29 Ill. App. 470. A mis-recital of a statute may be rejected as surplusage where the conclusion is "contrary to the form of the statute in such

case made and provided." 22 Cyc p. 370. It has been repeatedly held that, where the information or indictment substantially follows the language of the statute creating the offense charged, it is sufficiently certain. Fuller v. People, 92 Ill. 182.

Counsel for both parties assume that Paragraph 432, Chapter 38, is the wrong paragraph number and that the correct number is 439, and yet, upon referring to the Revised Statutes of 1925, compiled by Cahill, we find the paragraph in question is 432, which is the number given in the information. The drawer of the information evidently used the compilation of statutes by Cahill, while the attorneys briefing the case here have used the one by Smith-Hurd, which has different paragraph numbers. This illustrates the absurdity of holding that the paragraph number is an essential part of the information; otherwise a defendant could escape judgment by merely presenting some other compilation of statutes than the one referred to in the information. As there are several compilations, the avoidance of punishment would thus be easy.

It is conceded that the Municipal court had no jurisdiction to try felonies, but the use of the word "felonious" in the information does not make the crime a felony, and this word was surplusage.

The points made in the brief against the information are without merit, and as no other grounds are urged for reversal, the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and Johnston, J., concur.

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[illegible]

[illegible]

21,673

36 - 29673

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF ROSE HARRIS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 637

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

In this case a preliminary injunction was issued March 7, 1924, as prayed for in the bill of complaint, restraining and enjoining defendants to the bill, their several officers, agents, representatives and members, and associations, persons, etc., from assisting, aiding, confederating or conspiring with them, and having knowledge of said injunction from (1) "picketing or maintaining any picket or pickets at or near any of the buildings in which complainants, respectively, operate their businesses or along the routes used by persons in going to or coming from any of the places of business of the complainants, respectively" * * *; (2) "from watching, following, stopping, assaulting, beating, threatening, menacing, intimidating, harassing, molesting or interfering with any of complainants' employes" * * *; (3) from doing certain specific acts such as calling on or talking to any of said employes against their manifest will, or (4) addressing or applying to them profane, insulting and humiliating or obscene epithets, names, terms or language; (5) from soliciting or inducing them to quit their employment; (6) from molesting or interfering with any property of complainants or of their employes; (7) from threatening, participating or assisting in the doing of any of the things

specifically forbidden by the injunction.

As appears from the bill and affidavits supporting the injunction complainants were engaged in the business of the manufacture and sale of ladies garments and conducted what is known as open shops and employed persons irrespective of the fact whether they belonged to a union or not, and the defendants sought to engage in a campaign to compel them to conduct and operate union or closed shops, which complainants refused to do, and thereupon defendants entered into a conspiracy to call, and did call, a general strike of all employes engaged in the manufacture of ladies garments in Chicago, and to make the same effective caused complainants' places of business to be picketed by groups of persons.

This proceeding and other similar proceedings that are consolidated therewith for hearing in this court were inaugurated by filing various affidavits in the cause charging various persons with the violation of said injunction by picketing the premises of complainants or some of them and doing other acts in wilful disregard of said injunction. Writs of attachment were issued on March 22, 1924, to bring six of the respondents to said proceedings before the court for contempt, and on March 24, 1924, a rule was entered upon the other respondents, including appellant Rose Harris, to show cause why they and each of them should not be adjudged in contempt for violating said injunction.

After a hearing had in said proceedings, at which both oral and documentary evidence was introduced, and respondents were present represented by counsel who cross examined the witness, the court, on April 5, 1924, entered orders holding the several respondents in contempt of court for violating said injunction and imposed upon each of them a fine, and against some of them punishment by imprisonment in jail. The fines in the 23 cases ranged from $25 to $150, and the terms of imprisonment from 10 to 30 days.

specifically forbidden by the injunction.

It appears from the full and detailed supporting the injunction complaintants were engaged in the business of the manufacture and sale of ladies' garment, and understood that is known as open shop and employed non-union operatives of the that whether they belonged to a union or not, and the defendants sought to engage in a campaign to compel them to unionized and go into union or closed shops, which conspiracy, intended to do, and threatens defendants entered into a conspiracy to kill, and did kill, a general strike of all employees engaged in the manufacture of ladies garments in Chicago, and to make the a effective a used complainants' places of business to be picketed by groups of persons.

This proceeding and other similar proceedings that are consolidated involved in hearing in this court were instituted by filing various affidavits in the form charging various persons with the violation of said injunction by attending the premises of complainants or some of them and being active in willful disregard of said injunction. Writs of attachment were issued on March 22, 1924, to bring six of the respondents to said proceedings before the court for contempt, and on March 24, 1924, a rule was entered upon the other respondents, directing appellant Dorothy to show cause why they and each of them should not be adjudged in contempt for violating said injunction.

After a hearing had in said proceedings, at which both oral and documentary evidence was introduced, and respondents were present represented by counsel who cross examined the witnesses, the court, on April 9, 1924, entered orders holding the several respondents in contempt of court for violating said injunction and imposed upon each of them a fine, and minimum sums of time punishment by imprisonment in jail. The fines in the cases ranged from $25 to $100, and the terms of imprisonment from 10 to 30 days.

Each party has appealed from the order adjudging him or her to be in contempt, and the several appeals, 23 in number, have been consolidated for hearing in this court. The same points for reversal are urged in each case, viz: (1) the insufficiency of the affidavits upon which said order of attachment and rule to show cause were issued; (2) insufficiency of the evidence; (3) that the several fines imposed are excessive and disproportionate to the offenses proven.

Bearing upon the first point it is admitted that the several cases are purely remedial in character and constitute civil contempts. (Hake v. People, 230 Ill. 174; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. et al., 256 Ill. 196.) Being such the proceedings were properly inaugurated by affidavits filed in the chancery cause; and if they stated facts tending to prove the guilt of respondents they were sufficient to bring to the attention of the court the claim that the injunction had been violated. (Flannery v. People, 225 Ill. 62, 69.) Each of the affidavits states specifically that respondents with full knowledge of the issuance of the injunction, thereafter picketed in front of the business places of complainants. If this charge was true that alone was sufficient, regardless of any other alleged violation of the injunction, to warrant the attachments and rules in that cause. As, however, the point was not raised in any shape or form in the court below it is not properly open for consideration and none of the respondents is in a position to complain even if the affidavits were insufficient. But the point is sufficiently answered by the rulings of the Supreme Court in Hake v. People, 230 Ill. 174; Rothschild & Co. v. Steger & Sons Piano Mfg. Co., et al., 256 Ill. 196; O'Brien v. People, 216 Ill. 354; and Flannery v. People, 225 Ill. 62, 69, where the court passed on the sufficiency of similar affidavits in like cases.

As to the second point: While counsel has set forth the

[illegible] Much party has resulted from the [illegible] his or her to be in question, and the [illegible], and in number, have been commutated for [illegible] in this [illegible]. The grounds for reversal are stated in each case, viz: (1) the [illegible] of the affidavits upon which [illegible] and [illegible] and [illegible] show cause were issued; (2) [illegible] by [illegible]; (3) that the several items imposed are excessive and [illegible] to the offenses proven.

Bearing upon the first point it is [illegible] that the several cause are purely remedial in character, [illegible] civil contempts. (Ex parte v. Fraser, [illegible] 1[illegible]; [illegible] v. Gunter & Co. Ins. Co., [illegible], 66 111. 100. [illegible] the proceedings are properly instituted by [illegible] the chancery court; and if they [illegible] the [illegible] of the court the [illegible] (Gunter v. Fraser, [illegible] 111. 67, 68. [illegible] whether specifically [illegible] the punishment [illegible] the [illegible] of the injunction, [illegible] and in [illegible] of the [illegible] place of [illegible]. In this [illegible] and [illegible] and affidavits, [illegible] of any other [illegible] violation of the injunction, [illegible] the [illegible] in the [illegible]. As, however, the [illegible] court below it is not [illegible] in the court below it is not [illegible] the responsible in the [illegible] were insufficient. [illegible] in [illegible] by the [illegible] of the [illegible] [illegible] v. [illegible], [illegible] 1[illegible]; Hutchinson & Co. v. Gunter & Co. Ins. Co., [illegible], 66 111. 1[illegible]; O'Brien v. People, [illegible] 111. 1[illegible]; [illegible] v. People, [illegible] 111. 68, 69, where the court [illegible] of [illegible] or [illegible] affidavits in like cases.

As to the second point, [illegible] [illegible]

evidence in substance in his statement of facts he has not argued in what respect it is insufficient in any of the cases. From the evidence presented it appears that each of the respondents had notice or knowledge of the injunction, and notwithstanding such notice or knowledge deliberately violated its terms by picketing in front of places of business of one or more of the complainants for several days after the issuance of the injunction and some of them, in fact, after they were attached, and that each and all were manifestly parties to the conspiracy to carry on such picketing in open defiance of the court's order against it. Several of the respondents, including appellant, were also guilty of violating the specific terms of the injunction in other respects, either by acts of intimidation, threats of physical violence, assault, or the use of vile epithets against the employes of one or more of the complainants. It is unnecessary to review the evidence of them, for no respondent except one, namely, Mamie Kunz, took the witness stand or introduced any testimony whatever in denial of the charges made and proven. These main facts stand out in each of the cases: A strike was called by said defendant unions or locals against each of the complainants who were all engaged in the same line of business. Pursuant to that strike there was concerted and confederated action to prevent the employes of said complainants from working for them unless they unionized their shops; and pursuant to the conspiracy each of the respondents patrolled and picketed in front of complainants' places of business and intercepted or followed their employes going to or coming from their places of work, threatening and intimidating them in one way or another with full knowledge of the issuance of the injunction forbidding such acts. There is no denial of these facts nor any attempt to justify them. While counsel's brief states abstract propositions of law relating to contempt proceedings he does not attempt in the brief filed herein to argue or apply them to the facts in this case. We do not

evidence in another [illegible] his statement of facts in one per[illegible] in what respect it is insufficient or any of the cases. Then the evidence presented [illegible] [illegible] motive or knowledge of the [illegible], and [illegible] such notice or knowledge sufficiently [illegible] [illegible] by alleging in front of places of business of [illegible] the complainants for several days after the issuance of the injunction and none of them, in fact, after they were [illegible], and [illegible] all were manifestly perilous to [illegible] to do by so much picketing in open defiance of the [illegible] [illegible] it. Several of the respondents, including [illegible], was also guilty of violating the specific terms of the injunction in other respects, either by acts of intimidation, threats of violence [illegible], or the use of vile epithets against the [illegible] of one or more of the complainants. It is unnecessary to review the evidence of them, for no responsent [illegible] [illegible], in the [illegible], with the [illegible] or interfered with [illegible] [illegible] and proven. There [illegible] [illegible] of the [illegible] strike was called by said [illegible] [illegible] [illegible] of the complainants [illegible] [illegible] business. [illegible] [illegible] [illegible] [illegible] [illegible] federated union to [illegible] [illegible] [illegible] working for them before they [illegible] [illegible] [illegible] to the complaint [illegible] [illegible] [illegible] [illegible] in front of complainants' places of business and [illegible] [illegible] followed their employees [illegible] [illegible] [illegible] work, threatening and intimidating them in one way or another with full knowledge of the issuance of the injunction [illegible] [illegible]. There is no denial of these facts nor any attempt to justify them. While commonly held [illegible] [illegible] of injunction to contempt proceedings [illegible] not attempt in the [illegible] [illegible] herein to argue or apply them to the facts in this case. We do not

think the sufficiency of the evidence is open to any argument.

Counsel's argument is confined mainly to the third point, the alleged excessiveness and disproportionateness of the penalties imposed. The acts of some of the respondents were more aggravated or contumacious than those of others and the court manifestly recognized that fact in the imposition of different penalties. But there is nothing either in the amount of the fines or the duration of imprisonment fixed in any case which of itself indicates an abuse of the court's discretion in the matter of fixing punishment. In fact, counsel presents no particular test for a holding to the contrary except his private opinion, in which we do not concur. The same point was made in Hake v. People, supra, where it was said the court had a large discretion in the matter and might even in a case of civil or remedial contempt fix a definite period of imprisonment, either with or without a fine, and that courts of appellate jurisdiction were averse to interfering with the exercise of such discretion. (p. 196.) It is only where there is an abuse of the court's discretion that an appellate tribunal will interfere with its exercise. No abuse of it is manifest in this case or the several cases consolidated with it.

The fines were not excessive and punishment by imprisonment seems to have been imposed only in the cases where the evidence disclosed a defiant and contumacious disregard of the court's order accompanied either by numerous or persistent efforts to defeat it, or flagrant conduct in addressing threats and vile epithets to employes of some of the complainants or by assaulting or otherwise intimidating them.

Inasmuch as there was no serious controversy of fact, and no respondent except one took the witness stand or offered any evidence to contradict the proven charges it seems unnecessary to state the facts of each particular case. Six of the respondents

[illegible] the sufficiency of the evidence [illegible] any [illegible]

[illegible] points, the alleged [illegible] [illegible] of the penalties imposed. The [illegible] of the [illegible] more appropriate [illegible] [illegible] the court manifestly [illegible] [illegible] penalties. But there is another [illegible] of the time or the duration of imprisonment [illegible] which of itself indicates an abuse of the [illegible] discretion in the matter of fixing punishment. In fact, [illegible] for a building in the [illegible] [illegible], in which we do not [illegible]. The [illegible] [illegible], where it was [illegible] [illegible] or the matter and might even [illegible] [illegible] [illegible] period of imprisonment, [illegible] that course of [illegible] with the [illegible] [illegible] there is an [illegible] [illegible] tribunal will [illegible] manifest in this case [illegible] [illegible] with it.

The [illegible] of the imprisonment [illegible] the evidence disclosed [illegible] country's [illegible] efforts to [illegible] and vile [illegible] [illegible] manifesting [illegible] [illegible].

Inasmuch as [illegible] and no [illegible] any evidence to [illegible] to state the [illegible] [illegible] [illegible]

pleaded guilty, and the others, (except Mamie Kunz) including Rose Harris, by their silence practically admitted their guilt. The proof being conclusive that each of them participated in the picketing after receiving notice or personal service of the injunction, under circumstances indicating an utter disregard for the court's authority, some of them even verbally expressing themselves to that effect, and several of them, including Rose Harris, having followed employes and intimidated them by threats of violence, vile epithets and assault, it is enough to say that upon a review of the facts pertaining to each case we think the punishment in each case might be characterized as moderate rather than excessive, and none disproportionate to the offense proven.

No good or legal reason for a reversal of the judgment is shown. The court's jurisdiction was not questioned, the facts were not controverted, the evidence of violation of the injunction by each respondent was clear and undenied, and practically the only thing for the court to determine was the degree of punishment to be imposed, which varied as aforesaid according to the facts of the case. The punishment in the case of Rose Harris was a fine of $125 and imprisonment in the county jail for 10 days. It was none too severe for her flagrant, contumacious and contemptuous violation of the court's order.

And the same may be said with respect to the other cases the facts pertaining to which all appear in one bill of exceptions. In view of the recognized fact that the several cases involve the same principles and to a certain extent the same state of facts, at least so far as the charge of picketing is concerned, of which all are confessedly guilty, and that the cases vary only with respect to the particular conduct and degree of turpitude of the several respondents, it seems unnecessary that we should say more in this case, or do more than render a formal opinion adopting this as controlling in each of the other cases.

AFFIRMED.

Gridley and Fitch, JJ., concur.

[illegible] guilty, and the court, [illegible] the judge [illegible] Martin, by their silence or [illegible] their guilt. The proof bears conclusive that each of them participated in the planning of our revolutionary meetings or personal activities or the insurrection, under circumstances that they [illegible] the court's authority, some of them even [illegible] themselves to that effect, and several of them, including Jose Martin, having followed counsel and indictments from by threats of violence, with [illegible] and [illegible], it is enough to say that upon a review of the [illegible] to [illegible] the punishment in each case might be characterized as [illegible] than excessive, and some disproportionate to the [illegible] proven.

No good or legal reason for [illegible] of the judgment is shown. The court's jurisdiction was not questioned, the facts are not controverted, the evidence of violation of the injunction by each respondent was clear and conclusive, and [illegible] the only claim for the court to determine was the [illegible] to be imposed, which varied as [illegible] the [illegible] of the case. The punishment in the case of some [illegible] and imprisonment in the county jail [illegible] for [illegible] for her disorders, contumacies and contemptuous [illegible] of the court's order.

And the same may be said with respect to the other cases the facts pertinent to which [illegible] in the [illegible] of contumacies. In view of the proceedings that [illegible] the same principles and to a similar extent [illegible] of force, at least to [illegible] of [illegible], of which all are contemptuous, and that [illegible] only with respect to the particular contempt [illegible] of the evidence respondents. It seems unnecessary that we should go more in this case, or do more than [illegible] a formal opinion [illegible] constituting in each of the other cases.

Affirmed.

Brickley and Kitch, JJ., concur.

J. Dunn.

38 - 29675

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of MARGARET WELCH,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 637

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Consolidated for hearing with this appeal of Margaret Welch are the appeals of twelve other respondents to contempt proceedings in the above entitled cause, each of which was adjudged to be in contempt for violating a preliminary injunction issued in said cause on March 7, 1924. Some of the respondents were fined, and some fined and sentenced to imprisonment in the county jail. The fines ranged from $100 to $200. Two of the respondents were also sentenced to imprisonment, Marion Brostek for 10 days and Louis Sokoloff for 50 days.

The injunction restrains the defendants to the cause, their officers, agents, etc., and members of said union and locals, and all persons, etc., assisting, aiding, confederating or conspiring with them and having knowledge of the injunction from picketing at or near any of the buildings in which complainants, respectively, operate their businesses or along the routes used in going thereto or therefrom, and from following, stopping, assaulting, beating, threatening, menacing, intimidating, harassing, molesting or interfering with anyone employed by any of said complainants; from addressing or applying to any of them any profane, insulting,

humiliating or obscene epithet, name, term or language; from soliciting any of them to quit such employment; from injuring or interfering with any property used by any of the complainants or any of their employes, and from threatening, participating or assisting in the doing of any of the things forbidden by the injunction.

The contempt proceedings were inaugurated by three separate orders for rules to show cause entered March 15, 1924, upon affidavits filed in the cause, one against five of said appellants, one against five other appellants, one against two of them, and an attachment against appellant Ida Selkoff, all based upon affidavits specifically charging each of them with knowledge of the injunction by service of a copy thereof or otherwise, and with picketing in violation of its terms, and with the commission of other acts expressly forbidden by the injunction. The cases were heard March 25, 1924, upon said affidavits, answers of such appellants as made answer in writing, and oral and documentary evidence. All of the defendants were before the court represented by counsel who participated in the examination of witnesses against each of them, and in presenting evidence in their behalf. After such hearings the several sentences referred to were imposed.

During the same month contempt proceedings were had in said cause of action against various other respondents who were also sentenced for contempt, some of whose appeals were consolidated for hearing in the case of the appeal of Rose Harris, Gen. No. 29673, in which we have this day filed an opinion. Much we said therein is applicable to this case and the cases consolidated therewith. The arguments in all of the cases rest on practically the same grounds for reversal, namely, (1) the insufficiency of the affidavits on which the rule to show cause were entered; (2) the insufficiency of the evidence, and (3) that the sentences are excessive as to the amount of the fine, and cruel and unusual. An

[illegible]

additional ground urged in the cases of Bokoloff and Brostek is that the orders of commitment being entered in a case of civil or remedial contempt are unconditional.

We said in the Rose Harris case that none of the appellants in that case was in a position to complain of the insufficiency of the affidavits as the point was raised in this court for the first time, their sufficiency not having been questioned in the court below, and each respondent having been represented by counsel and given ample opportunity to defend the charges against him. The same state of facts exists in these cases, some of appellants taking issue by written answer to the rule, and all going to a hearing on the merits of the charges without questioning the sufficiency of the proceedings in any respect. What we said on this point in the Rose Harris case, referring particularly to Hake v. People, 230 Ill. 174; Rothschild & Co. v. Steger & Sons Piano Mfg. Co. et al., 256 Ill. 196; Flannery v. People, 225 Ill. 62, and O'Brien v. People, 216 Ill. 364, is equally applicable to the records before us. The specific contention that the affidavits presented no issue that respondents could meet by admission or denial is without force, for the bill charged defendants with calling and inaugurating a strike to compel complainants to conduct and operate union or closed shops, and entering into an unlawful conspiracy to effect that object, and the affidavits upon which the rules were issued set forth the picketing and patrolling in front of the premises of the complainants or some of them subsequent to the issuance of the injunction, the service of the injunction upon, or notice thereof to the persons so picketing, and refusal of most of them to accept it, their expressions of defiance and contempt for the order of the court, their refusal to give their names, their continued participation in acts forbidden by the injunction, the arrest of pickets who when released resumed picketing again in a

additional [illegible] and [illegible] is that the [illegible] or remedial [illegible] motivated.

[illegible] of the [illegible] pollutes is [illegible] the [illegible] filament of [illegible] for the [illegible] the [illegible] counsel and [illegible] him. The [illegible] pollute [illegible] to a [illegible] sufficiency [illegible] this point [illegible] v. Pennie, [illegible] and Gibson v. [illegible] respects [illegible] presented [illegible] penal is [illegible] log and [illegible] operate [illegible] subject [illegible] rules [illegible] of the [illegible] the [illegible] or police [illegible] of view [illegible] for the [illegible] continue [illegible] errors of [illegible]

short time, the arrest of several, four, five, and six times in the course of the strike, and that they abused and continued to molest and harass complainants and their employes. Not only were these issuable facts pertinent to the inquiry thus set forth, they were such as to show that each respondent was a party to the conspiracy charged to exist in the bill. It is fundamental that what one does to effect a conspiracy is chargeable to all others participating therein, and hence anyone alleged to be in the conspiracy was subject to such rule or attachment. All thus brought into court submitted themselves to its jurisdiction and by answering or offering testimony in defense, or both, went to hearing upon the issues presented on the charge of violating the injunction. They cannot, therefore, at this time question the sufficiency of the pleadings by which the issues were presented, even if defective, there being sufficient basis in the facts above stated to warrant a hearing thereon, where no specific objection was interposed.

The point made as to excessive punishment, either as to the amount of fine or duration of imprisonment, or both, has been fully answered in what we said respecting the same contention made in the case of Rose Harris, supra. In the cases cited above the same point was considered by the Supreme Court wherein it was held that the court had a large discretion in the matter of imposing punishment for civil or remedial contempt, and that courts of appellate jurisdiction were averse to interfering with the exercise of such discretion. We have reviewed the evidence in these several cases and find nothing to suggest abuse of such discretion.

As to the claim of the insufficiency of the evidence to establish the guilt of respondents it would seem to be enough to say that while the facts were controverted in some of the cases, the sufficiency of the evidence in those cases depended mostly on the credibility of the witnesses, which the Chancellor could better

[illegible] time, the [illegible] of [illegible], [illegible], [illegible] in the
course of the [illegible], [illegible] and [illegible] to [illegible]
and Marsden [illegible] [illegible]. [illegible] only [illegible] these
[illegible] from [illegible] in the [illegible] [illegible], they were
[illegible] to [illegible] [illegible] [illegible] to [illegible] [illegible]
charged to [illegible] [illegible] [illegible] that [illegible] were
to [illegible] a [illegible] [illegible] [illegible] [illegible]
theorem, not [illegible] [illegible] [illegible] [illegible] [illegible] was
just to [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
testimony in [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] on the [illegible] of [illegible] [illegible] [illegible] [illegible]
therefore, [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
by which the [illegible] were [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible].

The [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
been fully [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
made in the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
the [illegible] point [illegible] [illegible] [illegible] [illegible] [illegible]
held that the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
ing [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
associate [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
of such [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
cases [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
to establish the [illegible] [illegible] [illegible] [illegible] [illegible]
any [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible]
the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

determine than we. Without detailing the evidence, the summary of which is above stated, we think it fully justified the court in finding that each and all of them were active participants in effecting the object of said conspiracy and to that end engaged in picketing and in the commission of some other specific act or acts of intimidation prohibited by the injunction after they had been served with a copy of the same or otherwise acquired knowledge thereof, and proof was adduced of specific acts of an aggravated or contumacious nature which doubtless influenced the court in inflicting a greater punishment on some than on others, all of which was within the sound discretion lodged in the court. (See the cases herein cited.)

We fail to perceive the relevancy of the remaining point, which counsel has not argued, that the order of commitment in the cases of Sokoloff and Marion Wrestek was unconditional, inasmuch as by the terms of the order in each case the respondent was ordered imprisoned for a specified time unless sooner discharged by law.

We see no reason for not affirming the order in each case. The facts in the cases of the several respondents vary but little, mostly with respect to the degree of contumacy and defiance shown to the court's orders.

AFFIRMED.

Gridley and Fitch, JJ., concur.

determine them so. Thomas Hewitt, [illegible], the manager of which in above stated, on [illegible] fully justified the court in finding that such and [illegible] were acting participants in effecting the object of such [illegible] and engaged in planting, and in the construction [illegible] and aid or acts of instigation [illegible] the injunction after they had been served with a copy [illegible] operative required therein thereof, and that the [illegible] of an [illegible] or continuation [illegible] the court in justifying a [illegible] of [illegible], all of which was within the sound discretion lodged in the court. The [illegible] the court acted.

It is to perceive the [illegible] of the [illegible] points, which counsel has [illegible] stated, that the order of [illegible] in the cases of [illegible] and [illegible] were [illegible] illegal, inasmuch as by the terms of the order in each case the [illegible] was ordered [illegible] [illegible] [illegible] [illegible] by law.

We see no reason [illegible] [illegible] in each case. The [illegible] in the cases of the several [illegible] vary but little, mostly [illegible] [illegible] contumacy and defiance [illegible] the court's [illegible].

Affirmed.

Brickley and Dixon, JJ., concur.

19 - 29605

ROTH-MORSKY COMPANY,
a corporation,
Appellee,

v.

CHICAGO JOINT BOARD et al.,
Defendants.

ON APPEAL OF ELEANOR SADLOWSKI,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

240 I.A. 637

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order of the Circuit court adjudging appellant, Eleanor Sadlowski, guilty of contempt in violating an injunction, by the terms of which the defendants were restrained from picketing or maintaining pickets at or near the premises of complainant, or from congregating in front of the same in furtherance of such picketing, from attempting, by threats, intimidation or force, to induce employes of that company to leave its employment, from assaulting, or threatening, or intimidating such employes in going to or from complainant's premises, from intercepting, following, or talking to any of such employes against the manifest will of the latter, from calling any of such employes "scabs," and from advising, encouraging or assisting in the doing of any of such acts. The order appealed from was entered in the cause in which such injunction was issued, and was based upon a verified petition filed therein, against appellant, and May Moncynski and Catherine Koppa, as respondents, which charges that with full knowledge of the injunction, the respondents wilfully violated it by unlawfully engaging in

No. 3005

[illegible]
a corporation,
[illegible],

v.

[illegible]
[illegible],

[illegible]

[illegible]
appellant.

No. [illegible]

[illegible]

[illegible] appeal as from an order of the [illegible] court adjudging appellant, [illegible], guilty of contempt in violating an injunction, by the terms of which the defendants were restrained from [illegible] or matriculating pupils in or near the premises of complainant, or from communicating in terms of the same to [illegible] of such [illegible], from [illegible], by threats, intimidation or force, or from [illegible] of that company to leave the employment, from [illegible], or [illegible], or intimidating such employees in order to or from [illegible] premises, from [illegible], [illegible] or visiting to any of such employees without the [illegible] of the [illegible], from [illegible] of such employees [illegible], from [illegible], [illegible] or conducting in the [illegible] of such [illegible]. The [illegible] from was entered in the [illegible] in which [illegible] a [illegible], and was based upon a [illegible] [illegible], [illegible] [illegible], and the [illegible] and [illegible], [illegible], which charges that with full knowledge of the injunction, the respondents willfully did [illegible] in violation of the injunction.

picketing in front of complainant's place of business and intercepting and following complainant's employes and calling them "scabs," specifying the particulars of two instances of the latter sort, all to the injury and prejudice of the rights and property interests of the complainant, as well as in defiance of the order of the court. Upon this petition, a rule was entered on the respondents to show cause why they should not be attached and punished for contempt. Respondents appeared and answered the petition, and the matter was set for hearing at a later day, at which time, by agreement, it was heard with another petition of the same character and containing substantially the same charges, against one Max Novak. A number of affidavits were filed and considerable oral testimony was taken. At the conclusion of the hearing, the court found all four of the respondents guilty of contempt, and entered an order committing the respondent Novak to jail for twenty days, and the other respondents for ten days each, from which order each of the respondents has severally perfected an appeal. By agreement in this court, the four appeals have been consolidated for hearing and have been heard upon the record, abstracts and briefs filed in this case.

Respondent's counsel contend, first, that the petitions are "insufficient to sustain a decree;" second, that the court admitted improper evidence; third, that the competent evidence does not justify the findings; and fourth, that the punishment is excessive.

It is conceded by counsel that the proceedings in question are for civil, as distinguished from criminal, contempts. In Hake v. The People, 230 Ill. 174, the court had occasion to state the rules of procedure which apply to cases of this character. It held that such proceedings may be commenced by petition or affidavit filed in the court in which the injunction was issued,

pleading in front of complainant's place of business and intervening and following complainant's employees and calling them "scabs," specifying the particulars of the instances of the latter act, all on the injury and prejudice of the rights and property interests of the complainant, [illegible] in defiance of the order of the court. Upon this petition, a rule was entered on the respondents to show cause why they should not be attached and punished for contempt. Respondents appeared and answered the petition, and the matter was set for hearing at a later day, at which time, by agreement, it was to be disposed of upon petition of the [illegible] and containing substantially the same answer, [illegible] Novak. [illegible] number of witnesses on the [illegible] and [illegible] testimony was taken. [illegible] found all [illegible] and entered an order accordingly. The complainant appeals to this court, and the other respondents are the [illegible] which order each of the respondents has severally contested on appeal. By agreement in this court, the [illegible] have been consolidated for hearing and have been argued upon the [illegible] abstracts and briefs filed in this case.

[illegible] "unwarranted [illegible]", first, that the petitions are "insufficient to sustain a decree" because, that the court admitted improper evidence; third, that the [illegible] evidence was not justify the findings and "order", and the punishment is excessive.

It is conceded by counsel that the proceeding in question was for civil, as distinguished from criminal, contempt. In Mack v. The People, 220 Ill. 474, the court has occasion to state the rules of procedure which apply in cases of this character. It said that such proceedings may be commenced by petition or affidavit filed in the court in which the transgression was committed,

and whether commenced by petition or affidavit, "the alleged contempt need not be set out in the petition or affidavit with the same particularity as is required in a criminal information or indictment;" that on the hearing of an alleged civil contempt, the court is not confined to the respondent's sworn answer, but "may hear affidavits, or any other proper testimony, to enable the court to determine the truth of the matter according to justice and equity;" and that such a proceeding, from the beginning to the end, is "in all of its procedure, essentially a civil chancery proceeding, conforming itself, in its pleadings, character and quantity of proof required, and in its course through the appellate tribunals, to the rules and practice applicable to other chancery proceedings."

In O'Brien v. The People, 216 Ill. 354, it was also held, in effect, that if the court can see from the petition and affidavits filed that the respondents had notice of the charge against them and a reasonable opportunity to intelligently prepare their defense, that will be sufficient. This was followed in Flannery v. The People, 225 Ill. 62, where it was said (p. 68): "It is sufficient if, either by petition or sworn statements, the matter complained of is brought to the attention of the court;" and held a petition to be sufficient which was very similar to the petitions filed in the present case.

Under these authorities, the petitions must be held to be sufficient. By them, the respondents were fully advised of the charges against them, and they had the fullest opportunity, in person and by counsel, to meet such charges. Moreover, the record does not show that they objected at any time to the form of the proceedings, or to the sufficiency of the petitions.

The chief ground of complaint seems to be that the court permitted evidence to be heard concerning acts of the respondents which occurred after the petitions against them were

such whether commenced by petition or writ (Ibid.). The allegations contained need not be set out in the petition or affidavit which the same particularity as is required in criminal informations or indictments." What is the meaning of an illegal civil contract, the court is not concerned to inquire with such nicety. But "any deed affidavits, or any other [illegible], to enable the court to determine the [illegible] of the [illegible] and equity;" and that such a [illegible] thing. Thus the jurisdiction to try, in "in all of its procedure, essentially a civil chancery proceeding, controlled [illegible] by its [illegible], [illegible] and quantity of proof required, and in its course [illegible] the appellate tribunals, to the rules and principles [illegible] to other chancery proceedings."

In Gibbins v. The Queen, 22 Ill. App. [illegible], [illegible] held, in effect, that if the court was from the [illegible] affidavits filed that the respondents had [illegible] of an [illegible] against them and a reasonable apprehension to [illegible] their defense, that will be sufficient. This was [illegible] in [illegible] v. The People, 220 Ill. 68, where it [illegible] "It is sufficient if, either by petition or [illegible], the nature complained of is brought to the attention of the court;" and [illegible] a petition to be sufficient which was [illegible] the [illegible] filed in the present case.

Under these authorities, the petitions must be held to be sufficient. By them, the commissioners were fully informed of the charges against them, and they had the ultimate opportunity, in person and by counsel, to meet such charges. Moreover, [illegible] not show that they objected at any time to the form of the proceedings, or to the sufficiency of the petitions.

The usual period of suspension [illegible] to be that the court possesses authority to [illegible] [illegible] of the responsibilities which constitute after the [illegible] [illegible]

filed. It does ~~MAX~~ appear that some evidence of this character was heard by the chancellor. Assuming that such evidence was incompetent, still, under the familiar rule applicable to all chancery cases, it will be presumed, in the absence of any showing to the contrary, that the chancellor acted only upon the competent evidence; and if the record contains sufficient competent evidence to sustain the decree, the error, if any, in admitting the incompetent testimony may be regarded as harmless. (Kennard v. Curran, 239 Ill. 122, 132; Tunison v. Chamblin, 88 Ill. 378, 382.) There is nothing in the record to show that the chancellor based his findings and judgments upon the alleged incompetent testimony, and, in our opinion, there is ample evidence in the record, apart from any consideration of the alleged incompetent evidence, to sustain the findings and judgments of the court.

As to the contention that the evidence is insufficient to justify the findings, we have carefully studied the evidence in the record, and we find the clear preponderance of the competent evidence supports the findings of the chancellor. It was shown that the complainant is a manufacturer of women's dresses and has a large number of employes; that in the immediate vicinity of the premises occupied by it are many other garment manufacturers, and that the office of the garment workers' unions is located in the same vicinity; that a strike was on because the shops of complainant and other manufacturers were "open" shops; that the respondent Novak is one of the union officers, and that the three women respondents were employed on behalf of the unions, to "do organization work, which," as one of them expressed it, "consists in approaching people and inviting them to join the union;" that the respondent Novak engaged daily in "picketing," and apparently directed it; that on two occasions, after he was served with a copy of the injunction, he followed women employes of complainant and called them "scabs;" that the three women respondents were engaged daily

[illegible]

in picketing at and near complainant's premises, and that on several occasions they followed employes of complainant, called them "scabs," threatened them with personal violence, and in at least one case, assaulted one of the employes, for the evident purpose of intimidating such employes and causing them to quit their employment with complainant. All these acts were done after it was proved that respondents were fully aware of the issuance of the injunction and were acting in open defiance of it. The respondent Sadlowski, who is the only one of the four who claims she was not served with a copy of the injunction, admitted that in her work of "organizing the trade," she stood daily for hours in front of complainant's premises and, while there, she saw a printed notice posted on the door, which, she testified, she did not read, "because I heard it is an injunction there." The evidence shows the notice referred to was a copy of the injunction, which was posted as soon as the injunction was granted. It was also shown that similar notices were posted conspicuously elsewhere, mailed to all the defendants, and personally served on the other respondents with whom she was engaged in picketing.

As to the contention that the punishment is excessive, counsel for respondent takes the position that in a civil contempt punishment by imprisonment is not permitted. To this contention it is enough to say that the contrary was expressly held in Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, and was recognized as a punishment that could be imposed in a proper case in Hake v. The People, supra. We do not regard the penalties imposed on respondents as being excessive in view of all the facts and circumstances in evidence. What penalty shall be imposed in a particular case of civil contempt must, in the nature of things, rest largely in the discretion of the chancellor, and certainly it cannot be said in this case that the discretion of the

[illegible]

[illegible] "[illegible]." [illegible] "[illegible]." [illegible] "[illegible]." [

chancellor was abused.

For the reasons stated the order appealed from is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

75 - 29712

GRACHLINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MARY GURWITZ,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 638

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is one of twelve appeals perfected from the same order of the Superior court of Cook county adjudging the twelve appellants guilty of contempt of court for violating an injunction entered on March 4, 1934, restraining the appellants, who are members of garment workers' unions, and all persons aiding or confederating with them, from picketing in front of and near complainants' premises in furtherance of an alleged conspiracy to injure the complainants, who are manufacturers of ladies' dresses. These twelve appeals were consolidated in this court and heard upon the record, abstracts and briefs filed in this case.

The proceedings against appellants were instituted by the filing of affidavits in the cause in which the injunction was issued. Upon the filing of these affidavits, orders were entered directing writs of attachment to issue against the respondents, and upon such writs they were brought into court, at different times, and thereupon orders were entered setting a day for hearing of the charges made in the affidavits and releasing the respondents from custody upon their own recognizances. The

CHARCLINE [illegible] CO. et al.,
[illegible],

v.

JOINT BOARD OF [illegible] COUNTY et al.,
etc., et al.,
Defendants.

On appeal in the matter of
MARY GURSKITT,
Petitioner.

MR. JUSTICE MINER DELIVERED THE OPINION OF THE COURT.

This is one of twelve appeals prosecuted from the same order of the superior court of Cook County, adjudging the twelve appellants guilty of contempt in contempt proceedings instituted on a petition, filed [illegible], by the members of [illegible] school boards, and [illegible] acting or cooperating with them, from [illegible] of and more complainants' property [illegible] to injure the complainants, [illegible] of Indian' dreams. These twelve appeals were consolidated in this court and heard upon the record, abstracts and briefs filed in this case.

The proceedings against appellants were instituted by the filing of affidavits in the [illegible] which the injunctions were issued. Upon the filing of these affidavits, orders were entered directing writs of attachment to issue against the respondents, and upon such writs they were brought into court, at different times, and thereupon orders were entered setting a day for hearing of the charges made in the affidavits and requiring the respondents from contempt upon their own recognizances. The

record shows that all of them appeared in person and by counsel at the trial; that no objection whatever was made at any time during the trial to the manner in which the respondents had been brought before the court, nor to the form of the proceedings. All were tried together at the same time upon oral testimony as well as upon the affidavits previously filed, which were read in evidence, and at the conclusion of the hearing the respondents were found guilty of contempt of court for violation of the injunction above mentioned, and appellant Mary Gurewitz and five other respondents were severally fined $125 each; the respondent Eugenia Szhlachta was fined $100; the respondent David Krauss was fined $150; the respondent Isedore Dixler was fined $200; the respondent Minnie Seidel was fined $150, and in addition was sentenced to jail for five days; and the respondents Morris Kravis and John Gottlieb were each severally fined $200, and in addition were sentenced to jail for fifty days each.

It is contended that the Superior court did not acquire jurisdiction of the appellants by the mere fact that it issued attachments for them, for the reason that the affidavits for attachment were not sufficient to require appellants to answer the same, nor subject them to a penalty. This contention is not argued in the brief except by reference to briefs in two other similar cases, opinions in which are filed herewith. The point made in such other briefs is that the preliminary proceedings are insufficient. Without repeating what is said in the opinions filed in those cases, it will be sufficient for the purpose of this case to say, first, that no objection was made that the charges of the respondents were insufficient either in form or in substance, nor did the respondents claim they did not know with what they were charged; and, second, it is apparent from the record that they were fully informed of the nature of the charge against them and had every reasonable opportunity to defend

against the same; and, under the authorities, this is all that was required. (Hake v. The People, 230 Ill. 174; O'Brien v. The People, 216 Ill. 354; Flannery v. The People, 225 Ill. 62; Oster v. The People, 192 Ill. 473, 478.)

It is next contended that the finding that all the respondents had notice and knowledge of the injunction and the contents thereof is erroneous and not supported by the evidence. There is no merit in the contention. Respondents did not take the witness stand, nor introduce any evidence disputing in any manner the testimony of the witnesses who testified for the complainants or the affidavits read in evidence. The evidence shows that for many days before the attachments were issued, and after copies of the injunction, printed in large type, were posted in conspicuous places at the entrance to complainants' buildings, large numbers of the strikers, among them respondents, continued to patrol up and down in front of complainants' premises, directly in front of such notices, accosting employes, interfering with their coming and going, calling them "scabs," threatening them, and even resorting at times to actual violence; that the police were called and made many arrests of the persons so picketing, but the offenders returned as soon as bail had been furnished; that some of the respondents were warned that they were violating the injunction; that attempts were made to serve copies of the injunction upon all of the picketers but in most cases such service was refused; that several of respondents were personally served, however; that some of the picketers were brought into court and fined for contempt; and that three of the respondents, after being attached and released upon their assurance to the court that they would discontinue picketing until the trial, returned to the picket line and resumed picketing as before. It is impossible to read the evidence heard without being convinced that all of the respondents were fully aware of the fact and nature of the writ of injunction

against the [illegible] was granted. [illegible] The Kenia, [illegible] Qatar v. The [illegible]

It is [illegible] that the respondents [illegible] the injunction [illegible] the contents [illegible]. There is [illegible] the witness [illegible] manner the [illegible] for the complainants [illegible]. The evidence shows that [illegible] after copies of the [illegible] were posted in conspicuous [illegible] buildings, [illegible] committee [illegible] directly in [illegible] with their [illegible] them, [illegible] police were [illegible] but the [illegible] some of the [illegible] injunction [illegible] upon all [illegible] that [illegible] some of the [illegible] today, [illegible] rather [illegible] contains [illegible] and [illegible] evidence [illegible] was [illegible]

and were acting in open defiance of it. It is apparent that the acts of the respondents were concerted and had the effect of interfering seriously with the conduct of complainants' business.

It is finally contended that the sentences imposed are excessive, and that a sentence of imprisonment cannot be made in a proceeding such as this was. In Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, it was held that a fine and imprisonment in the county jail for a definite term, either or both, in the discretion of the court, is recognized in this state as a proper judgment for a violation of an injunction of a civil nature. Under the facts and circumstances shown by the evidence, we are unable to say there was any abuse of the court's discretion in that particular.

The order appealed from is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

and more critical in our collection of [illegible]. It is important that the note of the [illegible] [illegible] [illegible] of interfering serious[illegible] with the [illegible] [illegible] business.

It is finally [illegible] [illegible] [illegible] are necessary, and that a [illegible] [illegible] [illegible] made in a [illegible] [illegible] [illegible]. In [illegible] v. Kinney Pickens [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] importance in the course that a [illegible] [illegible], either by [illegible], in the [illegible] of the [illegible], is [illegible] [illegible] [illegible] as a proper [illegible] [illegible] [illegible] [illegible] of a [illegible] nature. Under the [illegible] [illegible] [illegible] [illegible], we are unable to [illegible] [illegible] [illegible] [illegible] [illegible] in that [illegible].

The [illegible] [illegible] [illegible] [illegible].

[illegible]

Barnes, [illegible] [illegible] [illegible] [illegible].

76 - 29713

GRACELINE DRESS COMPANY,
et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ROSE SILVER,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This is one of twenty-one appeals perfected from the same order of the Superior court of Cook county, in which the twenty-one appellants were found guilty of contempt of court for violating an injunction restraining the appellants - who are members of garment workers' unions - and all persons aiding or confederating with them, from picketing in front of and near complainants' premises in furtherance of an alleged conspiracy to injure complainants - who are manufacturers of ladies' dresses. While the appeals are several, the respondents were all tried at the same time upon the same charges, which were made in affidavits filed at the same time.

The affidavits state, in substance, that as soon as the injunction was issued, printed copies thereof were posted and conspicuously displayed on or along side of the doors of complainants' premises where they could be easily read, but that notwithstanding that fact, a great many persons, principally women, continued to patrol and picket in front of complainants' premises every working day, mornings, noons and nights, when employes ordinarily go to and from their work; that among those thus

patrolling and picketing in front of complainants' premises were Mary Roe, John Roe, Helen Jones, Jane Black and Emma Green (and other evidently fictitious names,) "whose true names are unknown" to the affiant, but whom, he alleges, "he can point out." Upon the filing of such affidavits, orders were entered that attachments be issued against the persons so named therein, to be brought into court "to answer for the alleged contempt of this court for the alleged violation of the injunction issued in this cause." Attachment writs were issued accordingly and the respondents were brought into court at different times. When appellant, Rose Silver, was thus brought in, an order was entered which states that "It appearing to the court that Emma Green, whose true names and address are Rose Silver, 3519 Ogden Ave., Chicago, respondent herein, has been attached and is now in custody of the sheriff and is present in person before this court, it is ordered that a trial of said respondent for the alleged violation by said respondent of the injunction heretofore entered in this cause be and is set for April 9th, 1924," and that such respondent "attend said trial in person from day to day until final order is entered in the matter." The order then states that respondent's solicitor "having in open court assured this court that said respondent will not picket or in any way violate the injunction until this matter is determined," it is further ordered that respondent be released from custody. Substantially similar orders were entered as each of the other twenty respondents were thus brought in. The transcript of the record "as per praecipe" shows that upon the day so set, the "cause came on for hearing upon the affidavits of A. R. Gray and others filed herein, charging said respondents with violations of the injunctional order heretofore entered by this court on the 4th day of March, 1924, and upon the answers of such of said respondents as have filed answers herein;" that the respondents all appeared in court

[illegible]

at the trial in person and by counsel; that the court heard considerable testimony on behalf of complainants, and that only one of the respondents (Yetta Hornstein) testified, confining her testimony to a denial of an alleged assault made by her. Thereupon respondents' counsel stated that he had listened to the testimony and spoken to his clients and that all of them "admitted they were there," and that he could not see "any useful purpose in calling on all of them to specify the number of times they have been there." After arguments, the court entered the order appealed from, which finds all guilty of contempt of court for violations of the injunction, and severally imposes a fine and imprisonment upon each of the respondents. The twenty-one appeals were consolidated in this court and heard upon the record, abstracts and briefs filed in this case.

It is contended that the method adopted of ascertaining respondents' names and bringing them before the court was improper. We do not find in the transcript any statement that respondents, or their counsel, made any objection in the trial court at any time to the manner in which respondents were brought before the court for trial, although the record recites that Mr. Sissman was present in court as their counsel, when they were brought in on the attachments, where (evidently) their names and addresses were ascertained and inserted, in lieu of the fictitious names, in the orders setting the cases for trial "for the alleged violation of the injunction." It appears that upon the trial, some of the witnesses did not know the respondents by name, but were able to identify them in the court room from having seen them several times in the picket line in front of complainants' premises. As their true names had been ascertained before the trial, and inserted in the orders entered when they were first brought in upon the attachment writs, no harm was done to any of them by this method of identification upon the trial. They did not dispute the testimony of the witnesses who

at the trial in [illegible] the [illegible] led considerable testimony on behalf of [illegible], and that only one of the [illegible] in the [illegible]. It is, nothing but hearsay testimony [illegible] made by her. Thereupon [illegible] to the testimony [illegible] "admitted very well there", [illegible] purpose in calling on [illegible] to verify the number of times they have been there." [illegible], the court overruled the objection appealed from, with a finding of contempt in consisting violations of the injunction, and sentenced appellant to a fine and imprisonment upon each [illegible]. The transcript shows more conclusively in this [illegible] upon the [illegible], vexatious and bad faith in this case.

It is contended that [illegible] responsibility [illegible] the [illegible] appellant. We do not find in the record [illegible] responsibility, or their agents, [illegible] to the manner in which [illegible] for trial. Although the [illegible] in court no their own [illegible], [illegible] in the [illegible] months, where [illegible] and incorrect, [illegible] the cause for trial [illegible] of the injunction. It appears [illegible] the [illegible] upon from [illegible] front of [illegible] certainly [illegible] they were [illegible] done in our [illegible] in this method of [illegible] trial. They did not [illegible] the [illegible] the

thus identified them as persons found picketing in front of complainants' premises. The purpose of the attachment writs was served when respondents were brought into court, and the orders directing them to appear on April 9, 1924, for trial for the "alleged violation of the injunction" (i. e., alleged in the affidavits) were sufficient to advise them in a general way, at least, of what they would be called upon to answer. (Oster v. The People, 192 Ill. 473, 478.) No objection was made at any time that the charges against the respondents were insufficient either in form or in substance, nor did they claim they did not know with what they were charged. It is apparent from the record that they were fully informed of the nature of the charges against them and had every reasonable opportunity to defend against the same; and where such is the fact, the preliminary proceedings are sufficient. (Hake v. The People, 230 Ill. 174; O'Brien v. The People, 216 Ill. 354; Flannery v. The People, 205 Ill. 67.)

Respondents also contend that the evidence does not justify the findings, nor show that respondents 'had knowledge of the injunction brought home to him or her.' The contention is wholly without merit. It was shown that for many days before the attachments were issued, and after copies of the injunction, printed in large type, were conspicuously posted as stated in the affidavits, large numbers of the strikers - among them respondents - continually patrolled up and down in front of complainants' premises, and directly in front of such notices, accosting employes, interfering with them, calling them 'scabs,' and resorting at times to actual violence; that the police were called and made many arrests but the offenders returned in a short time; that some of respondents were warned that they were violating the injunction; that four of them were personally served with copies of the injunction but that such service brought only a laugh from such respondents, without any cessation of the picketing.

at the trial in [illegible] if that the court issued considerable testimony on behalf of complainants, and that only one of the commissioners [illegible] to attend, constituting her testimony on a [illegible] counsel for [illegible]. Thereupon respondents' counsel objected that it had [illegible] to the testimony and answer in this [illegible] and that all of them "admitted they were there," and that no [illegible] purpose in calling all of them to verify the number of times they have been there." After a [illegible], the court sustained the order appealed from, which finds the [illegible] of contempt of court for violations of the injunction, and accordingly imposes a fine and imprisonment upon each of the [illegible]. The transcript shows more complicated in this [illegible] upon the merits, but stands not material in this case.

It is contended that the [illegible] of the [illegible] respondents' [illegible] and that [illegible] the [illegible] improper, in do not find in the transcript an assertion that respondents, or their counsel, made any objection to the trial court [illegible] to the manner in which [illegible] were brought before the court for trial, although the record [illegible] it [illegible]. [illegible] in court in their [illegible], when they were brought in on the attachment, where (only [illegible]) [illegible] and [illegible] and [illegible], in view of the [illegible] [illegible] the cause for trial [illegible] of the higher [illegible]. It appears [illegible] the [illegible] the respondents [illegible] in the court upon from [illegible] time to time in the court [illegible] of complainants' [illegible]. [illegible] conducted [illegible] trial, [illegible] in [illegible] when they were [illegible] in open [illegible], [illegible] a [illegible] to [illegible] by this [illegible] of [illegible] the trial. They did not impeach the [illegible] of the [illegible] who

thus identified them as persons found picketing in front of complainants' premises. The purpose of the attachment writs was served when respondents were brought into court, and the orders directing them to appear on April 9, 1924, for trial for the "alleged violation of the injunction" (i. e., alleged in the affidavits) were sufficient to advise them in a general way, at least, of what they would be called upon to answer. (Oster v. The People, 192 Ill. 473, 478.) No objection was made at any time that the charges against the respondents were insufficient either in form or in substance, nor did they claim they did not know with what they were charged. It is apparent from the record that they were fully informed of the nature of the charges against them and had every reasonable opportunity to defend against the same; and where such is the fact, the preliminary proceedings are sufficient. (Make v. The People, 220 Ill. 174; O'Brien v. The People, 216 Ill. 354; Flannery v. The People, 225 Ill. 62.)

Respondents also contend that the evidence does not justify the findings, nor show that respondents "had knowledge of the injunction brought home to him or her." The contention is wholly without merit. It was shown that for many days before the attachments were issued, and after copies of the injunction, printed in large type, were conspicuously posted as stated in the affidavits, large numbers of the strikers - among them respondents - continually patrolled up and down in front of complainants' premises, and directly in front of such notices, accosting employes, interfering with them, calling them "scabs," and resorting at times to actual violence; that the police were called and made many arrests but the offenders returned in a short time; that some of respondents were warned that they were violating the injunction; that four of them were personally served with copies of the injunction but that such service brought only a laugh from such respondents, without any cessation of the picketing.

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complain not [illegible]
was served upon [illegible]
orders directing them to [illegible]
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the Peonia. [illegible]
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that they [illegible]
them and [illegible]
same; and [illegible]
are sufficient. [illegible]
the Peonia. [illegible]

Respondents [illegible]
justify the [illegible]
of the injunction [illegible]
wholly without [illegible]
attachments [illegible]
printed in large [illegible]
affidavits. [illegible]
continually [illegible]
powder, [illegible]
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time to [illegible]
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injunction; that [illegible]
of the injunction [illegible]
from such [illegible]

It is impossible to read the evidence without being convinced that respondents were fully aware of the fact and nature of the injunction and were acting in open defiance of it. It is also impossible to escape the conclusion that these concerted acts of respondents had the effect of interfering seriously with the conduct of complainants' business, for which no adequate remedy was available to them except contempt proceedings. The evidence is not contradicted, and it is clearly sufficient to justify the findings made by the chancellor.

It is further contended that the punishments inflicted were "cruel and unusual." Eighteen of the respondents were fined $350 each and sentenced to ten days imprisonment. Two others were fined the same amount and sentenced (respectively) to fifteen and twenty days of imprisonment. The remaining respondent - the only man among them - was given twenty days in jail and fined $450. The uncontradicted evidence shows that at the time respondents were attached, a strike, instituted by members of the defendant unions, had been in progress for more than a month; that during that time complainants' buildings and places of business were picketed during every working day; that frequently a hundred or more strikers patrolled up and down the street in the two blocks in which complainants' premises are located, and interfered with complainants' employes to such an extent that guards were employed to escort employes to and from their places of employment; that the pickets surrounded such employes, crowding them, calling them "scabs," threatening them with violence unless they quit work; that many were arrested and sent away in custody of police only to return soon after; that attempts were made to serve the pickets with injunction notices and that service was refused in many cases; that the pickets refused to give their names and addresses; that about two weeks after the strike began some of the pickets were attached and tried and found guilty of contempt. Seven of these were fined a total

It is impossible [illegible] that [illegible] information [illegible] impossible [illegible] of representative [illegible] the conduct of [illegible] was equivalent [illegible] in most cases, [illegible] findings made by the [illegible].

It is [illegible] more "equal and unequal." [illegible] $250 each [illegible] filled the [illegible] twenty days of [illegible] man among [illegible]. The [illegible] attached, [illegible] had been [illegible] complainers' [illegible] every working day [illegible] portrayed [illegible] plaintiffs' [illegible] employes [illegible] employes [illegible] surrounded [illegible] [illegible] were [illegible] after; [illegible] methods [illegible] achieved [illegible] effect [illegible] and found [illegible] [illegible] filed a total

of $300, which was promptly paid by the attorney for the defendant unions; that the picketing continued; that thereafter twelve others were arrested and found guilty of contempt and fined amounts varying from $125 to $200 each, and some of them sentenced to small terms of imprisonment; that many others of the pickets were likewise found guilty of contempt for violating the same injunction and ordered punished but appeals were perfected; that in spite of all such convictions, the picketing continued; that during the week prior to the arrest of these respondents, at least twenty persons were constantly patrolling in front of complainants' premises and that the imposition of small fines and sentences apparently had no effect whatever. In view of these facts and circumstances, we think the punishment inflicted upon the respondents was not excessive. Certainly it cannot be said that the discretion of the chancellor in that respect was abused.

Finding no reversible error in the record, the order appealed from is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

of $500, which [illegible] the "[illegible]
[illegible]; that [illegible] [illegible]
were arrested [illegible] [illegible]
From 1828 to [illegible] [illegible]
of imprisonment. [illegible]
quality of [illegible]
punished [illegible]
convictions. [illegible]
the arrest of [illegible]
simply [illegible]
imposition of [illegible]
whatever. [illegible]
punishment [illegible]
taking it [illegible]
that [illegible]

[illegible]

appeals [illegible]

[illegible]

Dunne, [illegible]

77 - 29714

4299a

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
DAVID KRAUSS,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 638

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, David Krauss seeks to have reversed an order of the Superior court adjudging him guilty of contempt in violating an injunction.

The injunction was granted upon a bill, filed by certain manufacturers of ladies' dresses, which alleges that the defendant unions and certain other persons therein named, including appellant, who are members of garment workers' unions, instituted a strike against the complainants, and that the defendantsare interfering with the conduct of complainants' business. Upon the filing of that bill and its accompanying affidavits, an injunction was issued restraining the defendants from interfering with or threatening or intimidating any of complainants' employes and from soliciting or inducing any of such employes to quit their employment, and from aiding or assisting others in doing any such acts.

The contempt proceeding was begun by filing affidavits upon which a rule to show cause was issued against appellant. The affidavit allege, in substance, that Krauss and "two strange girls" called on the parents of Rose Iskiwitch, an employe of one of the complainants, and told such parents that if their

others

daughter did not stop working and "sign up at the union" there would be trouble; that "Rose would be beat up" and "would be in a hospital for six months." Apparently, Krauss filed an answer to the rule, as such an answer is referred to several times in the certificate of evidence, but what the answer contained does not appear from the praecipe record.

Upon the hearing, Krauss was present in person and by counsel, and after complainants' evidence was heard, testified in his own behalf. He denied making any threats. He admitted calling on the parents of Rose Iskiwitch, but claimed he was only giving them a little friendly advice.

Many legal propositions are stated in the brief of appellant's counsel, but they argue none of them. For the most part, they relate to the nature and form of contempt proceedings. No defect in the proceedings is pointed out or argued in the briefs, and we see none which require the order to be reversed. Krauss was not only a defendant to the original bill, but he was served with a copy of the writ of injunction and it is clear that he was fully informed of the nature of the charge made against him in the affidavits, was present in court in person and by counsel, and had full opportunity to meet such charges. This was sufficient, so far as the procedure is concerned. (Hake v. The People, 230 Ill. 174; O'Brien v. The People, 216 Ill. 354; Flannery v. The People, 225 Ill. 62.)

The only contention which is argued in appellant's brief is that the evidence does not prove, "or tend to prove," any violation of the injunction, or any intent on the part of the respondent to violate it. The evidence is clearly to the contrary. In so far as there was any denial by defendant of the facts stated in the affidavits, the question was one of the

daughter did not stop [illegible]
would be troubled [illegible]
a hospital [illegible]
to the rule, [illegible]
the conditions [illegible]
not appear [illegible]

[illegible]
by counsel, [illegible]
in his own defense. [illegible]
position on the [illegible]
giving him a fair [illegible]

Mary L. [illegible]
defendant's [illegible]
gave, they [illegible]
no defect in the [illegible]
brief, [illegible]
Brown was not [illegible]
served with a [illegible]
he was fully [illegible]
him in the [illegible]
and had full [illegible]
on the [illegible]
III. 174). [illegible]

The Facts.

[illegible]

Brief is [illegible]
any violation [illegible]
responsible [illegible]
hurry. In [illegible]
facts [illegible]

credibility of witnesses. The chancellor saw and heard them, and there is nothing in the record that would justify this court in reversing his conclusion.

For the reasons stated, the order appealed from is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

78 - 29715

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
WANDA KOLETTA,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 638

MR. JUSTICE WITCH DELIVERED THE OPINION OF THE COURT.

This appeal is from an order adjudging appellant, hereinafter referred to as respondent, guilty of contempt of court in violating an injunction entered March 4, 1924, by the Superior court upon a bill filed by sundry manufacturers of ladies' dresses against the defendant unions and certain of their members, who were engaged in a strike at that time.

The injunction restrains defendants and all other persons having knowledge thereof, from threatening, intimidating or assaulting any of complainants' employes.

The contempt proceeding was begun by filing affidavits stating, in substance, that on May 19, 1924, Anna Balind, an employe of one of the complainants, on leaving her employment for the day, was followed by respondent, who, on overtaking the employe, called her a vile name, and, saying: "You take my job; this is what you get," struck her a blow in the eye, knocked her hat off, and stepped on it; that the affiant screamed and a policeman ran up and arrested the respondent. The police officer's affidavit corroborating this statement was also filed, and thereupon a rule was entered upon respondent to show cause why she should not be attached and punished for contempt of court for

violating the injunction. It appears from the record that the respondent was then in court, apparently on some other matter, and on motion of complainants' solicitor, the rule to show cause was made returnable two days later, with leave to respondent to file counter-affidavits, if any. If any counter-affidavits were filed, the *praecipe* record does not show them, nor does the certificate of evidence. The record shows that upon the return of the rule, a hearing was had, in which the affidavits filed by complainants were read and oral testimony was heard in corroboration thereof; that respondent was present in person and by counsel, and testified in her own behalf. She also called another witness who was with her before the assault was committed but did not see the assault, nor know the respondent was arrested. At the conclusion of the hearing, respondent was fined $150 and ordered to stand committed until the fine and costs were paid, not exceeding four months.

Many legal propositions are stated in the brief of appellant's counsel, but they argue none of them. For the most part, they relate to the nature and form of contempt proceedings. No defect in the proceedings here in question is pointed out, or is argued in the briefs, and we see none which requires a reversal. It appears from the evidence that respondent had knowledge of the fact and of the nature of the injunction, and was acting in open defiance of it. She was fully informed, by the affidavits filed, of the nature of the charge made against her as to the assault upon Anna Balind, and she was present in court in person and by counsel at the time of the trial, and had the fullest opportunity to meet such charges. This was sufficient so far as procedure is concerned. (*Hake v. The People*, 230 Ill. 174; *O'Brien v. The People*, 216 Ill. 354; *Flannery v. The People*, 225 Ill. 62.)

Appellant's counsel say that they seek a reversal of the

order appealed from upon two grounds; first, that the finding of guilt is not supported by a preponderance of the evidence, and, second, that the finding that appellant had previously been found guilty of a violation of the injunction by another judge of the Superior court is erroneous because the evidence as to that fact was irrelevant and immaterial in this case. As to the first contention, we think the preponderance of the evidence clearly supports the finding of the chancellor. In so far as there was any denial by respondent of the facts testified to by complainants' witnesses, the question was one of credibility, and we see no reason why we should substitute our opinion in that respect for that of the chancellor, who saw and heard the witnesses. As to the second contention, if the evidence of the prior conviction was immaterial, it is presumed that the chancellor disregarded the same. There is sufficient evidence to sustain the order appealed from, apart from any consideration of such alleged immaterial evidence.

For the reasons stated the order appealed from is affirmed.

AFFIRMED.

order appealed from upon the ground that, [illegible], the finding of guilt is not supported by [illegible] of the evidence, and, second, in the finding that [illegible] had previously been found guilty of violations of the [illegible] another judge of the Superior Court in [illegible] that that was irrelevant and [illegible] to the first contention, we think the [illegible] of the evidence clearly supports the finding of [illegible]. As for the third we find it [illegible] complainants' witnesses, [illegible] credibility, and we see no [illegible] reason why [illegible] responsibility for that of the defendant, who [illegible] witnesses. As to the second contention, if the [illegible] prior convictions [illegible] to [illegible] chancellor disapproved the [illegible]. There is sufficient evidence to sustain the Superior Court's [illegible] of such alleged immaterial evidence.

For the reasons [illegible] the order appealed from is affirmed.

[illegible].

24 - 29661

HYMEN BROTHERS, a Corporation,
et al.,
Complainants and
Appellees,

vs.

INTERNATIONAL LADIES' GARMENT WORKERS'
UNION et al.,
Defendants.

CONSOLIDATED APPEALS
FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 639

On Appeal of OLGA GALICH,
Appellant.

Consolidated for hearing with similar
Appeals of BESSIE KATZ, No. 29664; ISIDORE
KREEGER, No. 29663; SAM DORF, No. 29666;
and JOSEPH KRAVITZ, No. 29671.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Olga Galich seeks to reverse an order of the Superior court of Cook county, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924; imposing upon her a fine of $175, together with the costs of the proceeding; and ordering that she be confined in jail until she pay the fine and costs, or until discharged according to law. On the same day similar orders were entered as to Bessie Katz, Isidore Kreeger, Sam Dorf and Joseph Kravitz, except that a larger fine, viz: $200, was imposed upon Bessie Katz, and they perfected separate appeals, which, by agreement, have been consolidated for hearing with the present appeal. One set of abstracts and briefs have been filed and the cases have been argued orally by respective counsel.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartner-

ships, engaged in the business of making and selling ladies' dresses and garments on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers; that the defendant Union and locals 5, 18, 59, 81 and 100, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike of its members, some of whom were employed by complainants or other similar concerns located nearby, and defendants had caused and were causing the premises of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be threatened, and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc.

On March 4, 1924, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaining pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or intimidating persons employed by or going to and from the premises of complainants; (e) from addressing or referring to any of complainants' employes as "scabs," or applying to them other offensive epithets; and (f) from advising, encouraging or assisting in the doing of any such things.

On March 27, 1924, on complainants' motion, the court, having considered the affidavit of Barnet L. Stein, other affidavits

filed and complainants' sworn bill, ordered that writs of attachment issue forthwith to bring before the court "Anna Smith, May Smith, James Smith, John Smith and Richard Smith (whose true names are unknown, to be pointed out by Barnet L. Stein) * * to answer for the alleged contempt of this court for the alleged violation of the injunction ordered by this court in this cause." In Stein's affidavit, sworn to on March 27th, he states in substance that he is a member of the firm of Stein & Seiden (one of the complainants), located at 212 South Market street, Chicago; that since the calling of the strike, February 27th, numerous persons have patrolled and picketed, singly and in groups, between the hours of 7:30 and 9:30 a. m., and 3:30 and 5:00 p. m., in front of said premises; that shortly after the injunction of March 4th was issued, his firm caused printed copies thereof to be posted on the doors of said premises and copies to be served on persons there picketing; that the picketing of many men and women, in groups, has recently become more violent and annoying; that about 9:00 o'clock a. m. on March 24th, he caused printed copies of the injunction to be served on certain pickets - three men and two women - whom he has seen regularly, either singly or in a group; that when its employes seek to enter said premises, or leave at night, these five pickets continue to call them "scabs" and other names, threaten them, and on occasions have attempted to strike or kick them; that he has seen them patrolling, picketing and so threatening employes every day during the past week, and particularly on March 26th, between the hours of 3:30 and 4:30 p. m.; that their names and addresses are unknown to him; but that their faces are familiar and he will be able to point them out. On the day following the entry of the court's order the respondents were arrested under said fictitious names, brought into Court and each identified by their true names. None of them thereafter made any motion to

quash the writ of attachment on any ground or questioned in any manner the jurisdiction of the court over their persons.

On April 1, 1924, there was a hearing at which all respondents were represented by counsel. Complainants introduced in evidence without objection Stein's said affidavit; an additional affidavit by him, sworn to on March 24th; and affidavits of Albert E. Manley and George F. Sherer, sworn to on March 24th. In Sherer's affidavit he states in substance that on the afternoon of March 21st he handed a printed copy of the injunction to Bessie Katz, telling her that it was a writ of injunction, preventing her picketing; that he attempted to read the contents to her but she walked away; that at that time she was patrolling and picketing in front of and adjacent to the premises of Stein & Seiden; that he again saw her patrolling and picketing there later on the same afternoon; that on the following morning, about 8:15 a. m., March 22nd, he again saw her picketing there and approaching employes of said firm and calling them "scabs;" and that later she became so boisterous to those entering said premises that she was arrested and taken to the police station. Complainants also introduced in evidence without objection a printed copy of the injunction. On the top of the paper are the words, in large black type, "Injunction Order," and on it are printed the title of the cause and the full provisions of the injunctional order, certified by the clerk under date of March 4th. It was agreed that this copy was identical with those which had been posted on the doors and entrances of complainants' premises, and with those which from time to time were being served upon various strikers and pickets. Complainants also called as witnesses Barnet L. Stein, R. R. Seiden (another member of said firm of Stein & Seiden), Louise L. Miller (an employe of said firm) and R. W. Stokes (a police officer), and they were examined and cross-examined. The respondent Olga Galich testified in her own behalf

[illegible]

[illegible] Jan 1, 1[illegible], [illegible] in which all
transgressions were prosecuted by a [illegible]. [illegible]
in evidence without objection. [illegible] affidavits by [illegible]
affidavit by [illegible]. [illegible] E. Manley and George [illegible]. [illegible] affidavit by [illegible] [illegible] he handed a [illegible] [illegible], telling
her that it was a [illegible] [illegible] the attempt to [illegible] [illegible] at that time [illegible] [illegible] Issued in the [illegible] patrolling [illegible] the following morning, [illegible] her placing them [illegible] ing them "[illegible]" [illegible] entering said premises [illegible] station. [illegible] tion a printed [illegible] the voice, in [illegible] printed the [illegible] functional order, [illegible] It was agreed that [illegible] been posted on [illegible] and with [illegible] various [illegible] Mason [illegible] of Cain & Salem [illegible] B. T. Gibson (a police [illegible] examined. The [illegible]

and she called one additional witness, a physician, who testified to treating her right foot prior to March 17th. None of the other respondents were called as witnesses. Stein testified in substance that he knows all five respondents, having frequently seen them on different days in front of said premises since the issuance of the injunction; that shortly after its issuance he caused copies of the injunction writ to be served on each; that "our deputy sheriff served them personally with injunctions in front of our premises;" that he personally saw said deputy attempt to hand a copy to each, but each refused to receive it, and then said deputy would put a copy "under their arm," and, as they would not take it, "it fell on the sidewalk;" and that on March 5th and thereafter printed copies of the writ, identical to one introduced in evidence, were posted on the front doors of said premises in full view of those passing by on the sidewalk. As to Olga Galich, he testified in substance that he has seen her at least a dozen times in front of the premises, since March 4th, patrolling and picketing, in company with some or all of the other respondents, and other striking garment workers; that on various mornings when employes were entering the premises she would try to push and crowd against and intimidate them and call them "scabs;" that he saw her doing said acts on Friday or Saturday morning, March 28th or 29th, when she was arrested under said attachment; and that on most occasions she was in company with Bessie Katz, and sometimes in company with the other three respondents and other men. As to Bessie Katz, he testified that he had seen her patrolling and picketing in front of said premises "most every day since the strike," and at least a dozen times since she was served with the injunction, and that she "was one of the most violent ones there," and a "leader of the other pickets." As to respondents Kreager, Dorf and Kravitz he testified that he has seen them all, almost every day since the calling of the

strike, patrolling and picketing in front of the premises, in company with said two women respondents and others. Seiden's testimony, and that of Stokes, corroborated that of Stein in material particulars. During the examination of Louise S. Miller (an employe of Stein & Seiden since February 18th, and who did not go out on the strike) all five respondents, then sitting in court, were identified by her. She testified that she knew respondent, Dorf, and the two women respondents, that she had seen the other men respondents in their company many times since the strike, patrolling in front of the premises of her employers; that one evening, "last Wednesday," as she was leaving the premises, Olga Galich and Bessie Katz, in company with Sam Dorf, attacked her, followed her to the elevated railroad station, and called her a "scab." Respondent, Olga Galich, a former employe of Stein & Seiden, denied ever having picketed in front of said premises or ever having attacked the witness Miller, who, she said, she formerly knew as "forelady" for Stein & Seiden.

On April 5, 1924, the orders appealed from were entered. The recitals and findings of the court in the separate orders as to each respondent are substantially the same. In the order as to Olga Galich it is recited that complainants filed affidavits against her, "whose true name was then unknown," on March 27th; that an attachment was issued against her, "under the fictitious name of Anna Smith, now known as Olga Galich," to show cause why she should not be punished for contempt for violating said injunction, "as charged in the affidavits herein filed upon which said attachment issued;" that she filed her affidavit in reply to said affidavits; and that the court has considered all affidavits and the bill of complaint and the testimony adduced at the hearing and the arguments of counsel. The court then finds that it has jurisdiction of the subject matter and of the parties, and, after making findings

as to prior proceedings in the cause, further finds in substance that Olga Galich was served with a printed copy of said injunction; that printed copies of the same had been posted on complainants' premises within full view of those passing; that Olga Galich was prior to the issuance of the injunction, and is, a dressmaker and a member of the defendant union; and that she wilfully violated said injunction in the following particulars: (a) in that she picketed and patrolled in front of and along the place of business of said Stein & Seiden, from day to day, from March 4th to March 26th, 1924, and even after she was served with the injunction and after the same had been posted on the doors of said place of business; (b) in that she did so especially during the mornings and afternoons of March 24th, 25th and 26th, sometimes alone and sometimes in the company of four other pickets, and on said days joined said four pickets and others in surrounding employes about to enter or leave their place of employment, and in interfering with their so doing, and in calling them "scabs" and other vile names, and in threatening them against returning to work; and (c) in that she, in company with Sam Borf, shortly prior to March 27th, so interfered with one Louise Miller, an employe of Stein & Seiden, as the latter was leaving said premises for her home, and followed her, and threatened and admonished her against returning to her work, and called her a "scab" and other vile names.

Counsel for appellants in all five appeals contend that the affidavits, which formed the basis for the issuance of the attachment writs, were insufficient, and that the writ should have been quashed; and that the court did not have jurisdiction of the subject matter of of the persons of the several respondents at the time of the hearing, and, hence, the orders appealed from should be reversed. We cannot agree. We think that the affidavits clearly

reversed. We cannot agree. We think that the [illegible] is clearly

were sufficient to form the basis for the issuance of said attachment writs, and to arrest the respondents under the fictitious names mentioned, - their real names not then being known. Furthermore, after their arrest and after their real names became known to the court, none of the respondents made any motion to quash the writs, or in any manner questioned the jurisdiction of the court over their persons. They treated the order for the writs, supported by said affidavits, as a rule upon them to show cause why they should not be punished for contempt for violating the injunction, and, on the hearing on the merits which followed, made no objection to the introduction in evidence of said affidavits. By so acting they waived all objections to the court's jurisdiction over their persons. (MacKenzie v. MacKenzie, 141 Ill. App. 126, 132; aff'd 238 Ill. 616, 623; Nicholas v. People, 165 Ill. 502, 504.) And, clearly, the court had jurisdiction of the subject matter. (O'Brien v. People, 216 Ill. 354, 363; Franklin Union v. People, 220 Ill. 355, 366; Lyon & Healy v. Piano Workers' Union, 289 Ill. 176, 181.) If there were any technical defects in the accusations or affidavits they were cured (15 Corpus Juris, p. 67, sec. 93.) However, we think that the affidavits were amply sufficient to advise them of the charges they were called upon to meet at the hearing, at which time they were given full opportunity to present their defense thereto, if any they had. (Make v. People 230 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367; Oster v. People, 192 Ill. 473, 478.) No substantial right of any of the respondents was infringed or denied. (Hymen Bros. v. International Ladies' Garment Workers' Union, No. 20,577, opinion of this appellate court filed June 9, 1925.)

And, in our opinion, there is no merit in counsels' further contention that there is no evidence, as to three of the respondents (Kreeger, Dorf and Kravitz) that they were served with notice of the injunction or had any knowledge of its issuance.

of the injunction or had any knowledge of its issuance.

Complainants' evidence is directly to the contrary and said respondents did not testify on the hearing. As said in O'Brien v. People, supra, (pp. 366-7), if they did not have knowledge of the existence of the injunction, "it was their duty to properly present that fact to the trial court upon the hearing, which they failed to do."

And we think that under all the evidence it is conclusively shown that all five respondents intended to violate the injunction, and did so wilfully and deliberately. And we cannot say that the amounts of the several fines imposed are excessive (American Cigar Co. v. Berger, 221 Ill. App. 332, 337); or that in their imposition the court abused its discretion. (Moeffken v. Belleville Trades & Labor Assembly, 239 Ill. App. 28, 36; Ash-Madden-Rae Co. v. International Ladies' Garment Workers' Union, 290 Ill. 301, 306).

The order of the Superior court appealed from, as to appellant Olga Galich, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

25 - 29662

HYMEN BROTHERS, a corporation, et al., Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al., Defendants.

IN THE MATTER OF THE CONTEMPT PROCEEDINGS AGAINST FLORENCE CORN, Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

240 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Florence Corn seeks to reverse an order of the Superior court, entered March 28, 1924, wherein she was adjudged guilty of contempt of court for violating an injunction against picketing, assaulting, etc., and committed to jail for thirty (30) days, or until discharged according to law, and ordered to pay the costs of the proceeding.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartnerships engaged in the business of making and selling ladies' dresses and garments on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers; that the defendant Union and locals 5, 18, 59, 81 and 100 are voluntary associations of which many garment workers are members; that the other defendants are officers, agents or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike of its members, some of whom were employed by complainants or other similar concerns located nearby, and defendants had caused and were causing the premises of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be

[illegible]

[illegible]

[illegible]

threatened, and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc.

On March 4, 1924, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaing pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or intimidating persons, employed or going to and from the premises of complainants; (e) from addressing or referring to any of complainants' employes as "scabs," or applying to them other offensive epithets; and (f) from advising, encouraging or assisting in the doing of any such things.

On March 13, 1924, on motion of complainants, the court, after considering the affidavit of Albert E. Manley, other affidavits and complainants' bill, ordered that a writ of attachment issue forthwith to bring before the court Florence Corn (appellant) and two other named women "to answer for the alleged violation of the injunction." In Manley's affidavit it is stated in substance that about 4:30 p. m. on March 6th he was in front of the premises of L. Wolman (one of the complainants) at 319 South Market street, and saw numerous strikers, including appellant, then and there patrolling and picketing; that he particularly noticed appellant and one Eleanor Sadlowska who had become boisterous and riotous and who then and there were arrested; and that on their way to the police station he gave them copies of the injunction writ.

threatened, and the [illegible] to be [illegible] to become so dangerous as to merit an [illegible] the same, etc.

On March 6, 1951, the [illegible] preliminary injunction motion, among other things, restraining the defendants, and all associations, unions and persons, [illegible], from participating with them and further known [illegible] of the injunction, by from physically or materially [illegible] or in any manner [illegible] premises; (b) from preventing or [illegible] in front of or in the vicinity of said premises an [illegible] of [illegible]; by from soliciting or inducing persons, or [illegible] in [illegible], by threats, force, violence or [illegible] to order [illegible], or commit the [illegible] employees; (c) from [illegible], a [illegible], threatening or intimidating persons, employed or [illegible] to [illegible] from the premises of complainants; (d) from [illegible] or [illegible] to any of complainants' employees as "scabs," or applying to them other opprobrious epithets; and (f) from [illegible], [illegible] or assaulting in the doing of any such things.

On March 13, 1951, on motion of complainants, the court, after considering [illegible] affidavits and complainants' bill, [illegible] a writ of attachment issue forthwith to bring [illegible] the court [illegible] and ten other named [illegible] the [illegible] of the injunction." In Mr. [illegible] affidavit it is stated, in substance that about 11:00 p. m. on March 6th [illegible] of the defendants of L. Coleman [illegible] of the complainants [illegible] and our numerous witnesses, including [illegible], were [illegible] picketing and [illegible]; that [illegible] and the Bloomsburg [illegible] and who [illegible] the police at that [illegible] of the injunction writ.

In the affidavit of C. G. Naegel are contained statements substantially the same as in Manley's affidavit and the further statements in substance that about 8 a.m. on March 8th he saw many strikers, including appellant and Eleanor Sadlowska who had been arrested on March 6th, patrolling and picketing in front of the premises or plant of Welman; that a few minutes later, as Adele Welman (sister of L. Welman) was coming to said plant, he saw appellant and Eleanor Sadlowska attack her and kick her; and that he heard them call her a "scab" and other vile epithets and threaten her life if she did not stay away from said plant. In the additional affidavit of Naegel and that of L. Welman are contained statements showing repeated violations of the injunction by many strikers in the vicinity of the respective premises of complainants. All four of these affidavits were sworn to on March 18th, the day before the attachment writ was issued. By virtue of the writ the appellant was arrested and brought into court. Pending the hearing she was released on her own recognizance. The record does not disclose that she ever made any motion to quash the writ. After some delay she filed an unsworn answer to the rule contained in the order for the writ, and on March 19th there was a hearing in open court on the charges, at which both she and her counsel were present.

At this hearing complainants introduced in evidence the four affidavits and also called as witnesses Manley and Naegel and five other persons, and they were examined and cross-examined. Appellant was a witness in her own behalf, and her said answer was read to the court.

Following the hearing the order appealed from was entered, in which, after reciting the prior proceedings, the court found in substance that the respondent (appellant) was served with copies of the injunction writ on March 6th, that prior to its issuance she was, and is now, a dressmaker and a member of the defendant

union, and that she knowingly and willfully violated the injunction in the following particulars, (a) in that on March 8th she engaged with another person in an assault upon Adele Wolman, an employe of L. Wolman, one of the complainants, and kicked her as she was about to enter her place of employment; (b) in that on March 6th, 7th, 8th and 11th she patrolled and picketed in front of and along the places of business of complainants; (c) in that on the afternoon of March 11th, she, in company with four other women, picketed in the vicinity of 325 West Jackson boulevard, Chicago, and, while so picketing she, together with the four other women, attempted to assault a small girl, coming out of the building on said premises, that thereupon a police officer, named Gravle, endeavored to prevent such assault, and that thereupon she and the four other women attacked him and scratched, bruised and beat him; (d) in that on March 17th she patrolled and picketed on South Market street and West Jackson boulevard in front of and along the premises of several of complainants, and that she did this after she had appeared before the court on March 14th (having been arrested on said attachment writ and released on her own recognizance), and had promised the court that she would not again patrol or picket in the vicinity of the premises of any of complainants; and (e) in that she so patrolled and picketed on March 17th after the following further happenings; That prior to February 27th, when said strike was called, she was employed by the Queen Dress Company; that thereafter the defendant union called off the strike as to that company and she (appellant) returned to her work; and that on March 14th, through the efforts of one Bielis, a representative of said union and a defendant to complainants' bill, she obtained a leave of absence for ten days from her employer, and left her usual work and engaged in said patrolling and picketing.

[illegible]

We deem it unnecessary to discuss at length the testimony given on the hearing by complainants' witnesses, or that of appellant in her own behalf. Suffice it to say that after reviewing the same, as contained in the abstract, we are of the opinion that the findings of the court are fully sustained by a clear preponderance of the evidence. Counsel for appellant contend that the court erroneously admitted certain testimony in evidence. We fail to discover any such rulings as can be considered prejudicial. Even if certain admitted testimony might be considered as incompetent and irrelevant under the charges as contained in the affidavits, still there was abundant proper evidence to support them. And in such case a reviewing court will presume that the court did not consider any incompetent evidence. (Heintz v. Dennis, 216 Ill. 487; Dings v. Dings, 125 Ill. App. 318, 320.)

And in our opinion there is no merit in counsels' further contention that the court did not acquire jurisdiction of appellant's person for the reason that said affidavits, which formed the basis for the issuance of the attachment writ, were insufficient. We think they were sufficient for that purpose, and also for the rule on appellant, contained in the order for the writ, to show cause why she should not be adjudged in contempt. She made no motion at any time to quash the writ, but, on the contrary, treated the order for the writ as a rule on her to show cause, etc., and filed an answer on the merits. By so doing she waived all objections to the court's jurisdiction over her person. (Mackenzie v. MacKenzie, 141 Ill. App. 126, 132; aff'd, 238 Ill. 616, 623; Nicholes v. People, 165 Ill. 502, 504.) And the affidavits were clearly sufficient for the issuance of the rule, and on the subsequent hearing she was given ample opportunity to meet, if she could, the charges contained therein. (Hake v. People, 220 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367.)

[illegible]

testimony given [illegible] in reasonably-detailed statement, or that of physicians in most [illegible]. [illegible] that after reviewing the cases, as mentioned in the [illegible], we are of the opinion that the treatment of the [illegible] by a clear preponderance of the evidence. Neither [illegible] contend that [illegible] in evidence. [illegible] to discover any [illegible] alleged prejudicial. [illegible] considering [illegible] contained in the [illegible] [illegible] demanded to [illegible] case. [illegible] trial court will presume that [illegible] [illegible] Dennis, [illegible] 116, [illegible]

[illegible]

contention that the [illegible] appellant's [illegible] [illegible] formed the basis for the [illegible] [illegible] inadmissible. [illegible] also for the [illegible] appellant, [illegible] the [illegible] the writ, to show [illegible] [illegible] [illegible]. She made no motion [illegible] [illegible] trary, [illegible] [illegible] course, [illegible] [illegible] waived on [illegible] [illegible] (Bookman v. [illegible], [illegible] [illegible] 616, 618; [illegible] v. [illegible], [illegible] [illegible] affirmative [illegible] [illegible] and [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] People, [illegible] 101; [illegible] v. [illegible], [illegible] [illegible].)

Counsel argue that, inasmuch as two of the court's special findings relate to acts done by her on dates subsequent to the time of the issuance of the attachment and the rule (March 13th) the sentence is erroneous, because, apparently, it is based partly on such subsequent acts. The conclusion does not follow. In cases like the present the extent of the punishment rests largely in the court's discretion, and reviewing courts will not interfere with the exercise of such discretion except when abused. (Ash-Madden-Rae-Co. v. International Ladies' Garment Workers' Union, 290 Ill. 301, 306.) And, even if the court's findings as to such subsequent acts, and the evidence to support such findings, be entirely disregarded, we cannot say, in view of the other facts and circumstances in evidence, that there was any abuse of discretion in fixing appellant's punishment at thirty days in jail, etc. (American Cigar Co. v. Berger, 221 Ill. App. 332, 337; Hoeffken v. Belleville Trades & Labor Assembly, 229 Ill. App. 28, 35.) And in a proceeding for civil or remedial contempt, such as this was, punishment by confinement in jail is not unusual or improper, as urged by counsel. (Hake v. People, 230 Ill. 174, 195; Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 200.)

The order of the Superior court appealed from should be affirmed and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

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HYMEN BROTHERS, a corporation, et al., Complainants and Appellees,	APPEAL FROM
v.	SUPERIOR COURT,
INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al., Defendants,	COOK COUNTY.
IN THE MATTER OF THE CONTEMPT PROCEEDINGS AGAINST MEYER BARKAN, Appellant.	240 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by Meyer Barkan from an order of the Superior court of Cook county, entered May 29, 1924, adjudging him guilty of contempt of court for violating an injunction against picketing, and committing him to jail for fifty days, or until discharged according to law.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartnerships, engaged in the business of making and selling ladies' dresses and skirts on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers; that the defendant Union and locals 5, 16, 59, 81 and 100, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents, representatives or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike of its members, some of whom were employed by complainants and other similar concerns located nearby, and defendants had caused and were causing the premises of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be threatened,

[illegible]

[illegible]

[illegible]

and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc. On March 4, 1924, following the prayer of the bill, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and other persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaining pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion, not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or inducing persons, employed by complainants, not to go to or from said premises; (e) from injuring or attempting to injure complainants' property; and (f) from advising, encouraging or assisting in the doing of any such things.

On May 10, 1924, the court entered a rule upon appellant, Meyer Barkan, to show cause why he should not be punished for contempt of court for violating the injunction. The rule was based upon the affidavit of one Ed. Weiss. Barkan filed an answer to the rule, denying all the material facts alleged against him, and on May 22nd, there was a hearing at which Barkan and his counsel were present. The Weiss affidavit and that of Albert E. Manley were read, and afterwards Weiss and four other witnesses, called by complainants, were examined and cross-examined at length in open court. Barkan testified in his own behalf and one witness for him. At the conclusion of the hearing the court entered the order in question, in which the court found in substance that Barkan had notice and knowledge of the injunction shortly after its issuance; that notwithstanding such knowledge he, on April 23, 1924, violated the injunction, in that he instructed certain women, who were picketing in front of the place of business of one of the complainant

copartnerships, at 324 South Market street, Chicago, to continue to picket by walking back and forth in front of their premises, and advised said women not to be afraid but to continue their picketing, and that on divers other days, prior and subsequent to said date, at the offices of said defendant Unions in Chicago, he advised and counseled divers persons to continue to picket in front of the places of business of complainants, all in violation of the injunction; and that at divers times before and after said date he appeared in front of the places of business of some of the complainants, and counseled with and directed divers persons, who were then and there picketing, with respect to their activities in so picketing, and otherwise took an active part in directing said picketing activities and in urging and counseling members of the defendant Unions, and others, to violate said injunction by patrolling and picketing in front of the places of business of complainants or some of them.

Counsel for Barkan first contend that the findings are not supported by the evidence. We have carefully read the abstract of, and portions of, the certificate of evidence contained in the present transcript and cannot agree with the contention. While Barkan, who was connected with one of the local unions in some official capacity, admitted that he had notice and knowledge of the terms of the injunction the day after its issuance, he denied that he had knowingly or willfully violated it at any time. Complainants' evidence, however, clearly discloses that he, knowingly, willfully and repeatedly violated the injunction, while in force, at the times and in all the particulars mentioned in the court's findings.

It is next contended that the affidavit of Albert E. Manley was insufficient to base an order of attachment upon, or to order a rule upon Barkan to show cause. It appears that Barkan was arrested on an attachment issued by the court and based

[illegible]

upon Manley's affidavit, dated April 11, 1924. It was clearly sufficient to base the issuance of such attachment. Furthermore, it does not appear that at any time in the trial court Barkan moved to quash the attachment or in any manner questioned the sufficiency of the affidavit or the propriety of his arrest. Furthermore, the rule on Barkan to show cause, etc. was based upon the affidavit of Ed Weiss, which, in our opinion, was amply sufficient to form the basis for the rule, and, before the order appealed from was entered, Barkan was afforded ample opportunity to meet the charges made against him. (See, Hymen Bros. v. International Ladies Garment Workers' Union, No. 29577, opinion by this appellate court, filed June 9, 1925; Hake v. People, 230 Ill. 174, 192.)

It is further contended that the trial court erred in certain rulings on evidence. We fail to find any such rulings which require a reversal of the order. Counsel argue that Barkan was prejudiced by the court's refusal to admit in evidence a certain time card, purporting to show the times when Barkan went to work for his employer and when he ceased working on a certain day. The objection to its admission was that it was not properly authenticated. The record discloses that the court at the time inspected the card, but neither the card nor a copy thereof is contained in this transcript, so the ruling should be presumed to have been correct. Furthermore, it has reference only to one day of Barkan's time, and does not cover other times when he was engaged, as charged and as the evidence shows, in repeated violations of the injunction.

And we do not think that there is any merit in the further contentions of counsel (1) that a sentence of imprisonment cannot properly be entered in a proceeding for civil contempt (see, to the contrary, Hake v. People, 230 Ill. 174, 196; Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 203); and

upon Hanley's affidavit, [illegible] It was clearly sufficient to bar the issuance of [illegible] writ. Furthermore, it does not appear that at any time the trial court Durham moved [illegible] in any manner questioned the sufficiency [illegible] of his arrest. Furthermore, the [illegible] was based upon the affidavit [illegible] in our opinion, [illegible] sufficient in form [illegible] before the court appealed from [illegible] voluntarily to meet the [illegible] Extradition; [illegible] approved by this court [illegible] 121, 174, 195.)

It is [illegible] in certain rulings [illegible] evidence [illegible] which [illegible] was prejudiced [illegible] certain [illegible] to work for [illegible] days. [illegible] authenticated [illegible] inspected the [illegible] contains. [illegible] have been [illegible] of Durham [illegible] good, as [illegible] of the [illegible]

[illegible]

Further [illegible] ment cannot [illegible] Except [illegible] [illegible]

(2) that the sentence of 50 days in jail cannot be justified because of its severity. Under the facts and circumstances disclosed, we are unable to say that the court in fixing such sentence abused its discretion, or that the sentence is too severe. (American Cigar Co. v. Berger, 221 Ill. App. 332; People v. Russato, 216 Ill. App. 519, 529.)

Finding no reversible error in the record the order of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Witch, J., concur.

30 - 29667

HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF JENNIE LIEBERMAN,

Consolidated for hearing on similar appeals of FREIDA REIKER, No. 29668, and LENA MOVITZ, No. 29669.

CONSOLIDATED APPEALS
FROM SUPERIOR COURT,
COOK COUNTY.

240 I.A. 639

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal, Jennie Lieberman seeks to reverse an order of the Superior court, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924, and committing her to jail for twenty (20) days, unless sooner discharged by law, and also imposing upon her a fine of $200, - she to be confined in jail until said fine and the costs of the proceeding be paid, or until she be discharged according to law. On the same day similar orders were entered as to Freida Reiker and Lena Movitz (except that the former was sentenced to 30 days in jail), separate appeals were perfected by them, and, by agreement, the three appeals were consolidated for hearing in this appellate court.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartnerships, engaged in the business of making and selling ladies' dresses and garments on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers;

that the defendant Union and Locals, Nos. 5, 18, 59, 81 and 100, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike of its members, some of whom were employed by complainants and other similar concerns located nearby, and defendants had caused and were causing the premises of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be threatened, and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc.

On March 4, 1924, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaining pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or intimidating persons, employed by or going to and from the premises of complainants; (e) from addressing or referring to any of complainants' employees as "scabs" or applying to them other offensive epithets; and (f) from advising, encouraging or assisting in the doing of any such things.

On March 26, 1924, on complainants' motion, the court, after considering the affidavit of Albert E. Manley, other affidavits filed, and complainants' sworn bill, ordered that writs of attachment issue forthwith to bring before the court "Anna Roe, May Roe and Bertha Roe, whose true names are unknown, to be pointed out by Albert E. Manley, * * to answer for the alleged contempt of

least the defendant Union and Locals, Nos. [illegible], and [illegible], are voluntary associations of more than [illegible] members; that the [illegible], agents or [illegible] of the various local [illegible], on February [illegible], 19[illegible], said local organizations instituted a general strike of its members, some of whom were employed by complainants and other similar concerns in the [illegible], causing the premises of complainants [illegible] to be picketed, their [illegible] to be threatened, and the [illegible] to become so congested [illegible], etc.

On March [illegible], 19[illegible], the court issued [illegible] injunction which, among other things, enjoined [illegible], and all associations, unions, [illegible] or combining or conspiring with them [illegible] (1) from [illegible] or maintaining [illegible]; (2) from patrolling or congregating [illegible] in the vicinity of [illegible] premises in furtherance of [illegible] of inducing persons, [illegible] drivers or operators [illegible]; (4) from assaulting, [illegible] persons, employed by or [illegible]; (5) from addressing [illegible] as "scabs" or [illegible]; and (6) from advising, encouraging [illegible].

On March [illegible], 19[illegible], on complainants' motion, the court, after considering [illegible] affidavits filed, and [illegible] of all [illegible] may [illegible] out by [illegible]

this court for the alleged violation of the injunction ordered by this court in this cause." In Manley's affidavit, sworn to on March 26th, he states in substance that he is a deputy sheriff of Cook county; that on the morning of March 21st he served a printed copy of the injunction writ on each of three women "whose names are unknown to me, but whose faces have become familar through my having seen them constantly in front of 224 South Market street, Chicago, in which building is located the firm of C. H. Lowenthal & Co., one of the complainants;" that he advised these three women that the injunction restrained them from picketing and patrolling in front of the premises, but that they refused to take the copy of the injunction and continued to picket and patrol; that at various times he has seen them approach employees of said Lowenthal & Co. and "threaten them against working for said Lowenthal and assault them;" that he has tried to ascertain their names and addresses but they refused to give them; that he has seen them picketing in front of said premises every day since he served them with said writ; and that at times he has seen them approach employes of said Lowenthal & Co., threaten them in loud tones and call them "scabs," and at times strike and beat them. Shortly after the entry of the order the three respondents were arrested and their true names ascertained by the court. The record does not disclose that any of them, at any time thereafter, moved to quash the writs or in any manner questioned the jurisdiction of the court over their persons. On April 1, 1924, there was a hearing, at which all respondents were present and represented by counsel. Complainants introduced in evidence, without objection, Manley's affidavit and those of four other persons, and a printed copy of the injunction writ. Nine witnesses also testified for them and most of them were cross-examined by counsel for respondents. None of the respondents were called to testify in defense of the charges made in the affidavits.

Following the hearing the orders appealed from were

entered, in which the court, in the order as to Jennie Lieberman, after reciting the prior proceedings made numerous findings. In the orders as to the other two respondents the findings are very similar. As to Jennie Lieberman the court found in substance that she was served with a copy of the injunction on March 21, 1924, and that on that day, and subsequently, copies thereof were posted on complainants' premises in full view of those passing; that she had been, and is now, a dressmaker and a member of the defendant Union; and that she willfully violated said injunction in the following particulars: (a) in that, after she had been served with a copy and had knowledge of the issuance of the injunction she picketed and patrolled, from day to day, in front of and along the premises of C. H. Lowenthal & Co; (b) in that she did this, alone or in company with others, especially between the hours of 8 and 9 a. m. and 3:30 and 5 p. m., from March 21st to March 26th, inclusive, excepting Sunday, and interfered with employes of said firm when entering or leaving said premises, and called them "scabs" and other vile names, and threatened them against returning to work for said firm; (c) in that she, in company with others, early in the morning of March 21st, approached one Justine Zeus, as the latter as an employee of said Lowenthal & Co., was about to enter said premises, and struck and beat her, and said respondent was then and there arrested, taken to a police station, released on bail, and immediately thereafter returned and continued her said picketing in front of and near said premises; (d) in that she, in company with others, on the morning of March 26th, committed similar acts as to Julia De Rosa, an employee of said Lowenthal & Co., and after another arrest returned and continued her picketing; and (e) in that she appeared in court on March 28th, after being arrested under said attachment writ, and asked and obtained her release on her own recognizance upon the promise that she would desist thereafter from said picketing and further violations of the injunction, yet subsequent to her said release,

and notwithstanding her said promise, she continued to picket alone or with others in front of said premises. In the order as to Frieda Reiker there is the additional finding that she, in company with respondents Lieberman and Novitz, on the afternoon of March 25th, picketed in front of said premises, and while so doing struck one May Johnston, an employe of said Lowenthal & Co., on the chest and back, as said Johnston was leaving said premises, whereupon said Reiker was arrested, released on bail and thereafter returned and continued her said picketing, etc.

After reviewing the abstract of the testimony introduced on the hearing it is apparent to us that all of the court's findings, in said three orders appealed from, are amply sustained by the evidence. Counsel for the several appellants contend that the affidavits of Manley and others, which formed the basis for the issuance of the attachment writs, were insufficient, and that the trial court did not have jurisdiction of the subject matter or of respondents' persons at the time of the hearing. The same contention was made in the similar Galich case, No. 29661, opinion this day filed, and, for reasons therein stated, was decided adversely to said Galich. In the present cases, as in the Galich case, none of the respondents, after their arrest under the attachment writs, moved to quash the writs or in any manner questioned the court's jurisdiction over their persons. They treated the order for said writs, supported by the affidavits, as a rule upon them to show cause why they should not be punished for contempt for violating the injunction, and, on the subsequent hearing on the merits, made no objection to the introduction in evidence of said affidavits, or questioned the court's jurisdiction over them. We think it clear that the court had jurisdiction of the subject matter and of their

persons, that the affidavits were amply sufficient to advise them of the charges they were called upon to meet, that at the hearing they had full opportunity to present their defense, if any they had, to said charges, and that none of their rights was infringed or denied. (See Franklin Union v. People, 220 Ill. 355, 366; Hake v. People, 230 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367; Cater v. People, 192 Ill. 473, 478.)

And there is no merit in counsels' further contentions (1) that certain incompetent evidence was admitted as to certain of the respondents which was so prejudicial to them as to require a reversal; (2) that the punishments imposed were unusual and excessive; (3) that the punishments were made so severe because of the court's findings that respondents had broken their promises not to engage in further picketing, etc., after their arrests on the attachment writs and their release on their own recognizances; and (4) that "unconditional" sentences to imprisonment in a proceeding for civil or remedial contempt are improper and erroneous. As to the last contention it is sufficient to cite the cases of Hake v. People, 230 Ill. 174, 196, and Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 205, where in such proceedings punishments by imprisonment and fine were sustained. We are at loss to understand the use of the word "unconditional" in this connection. Respondents were ordered imprisoned for the number of days mentioned "or until discharged according to law," as was proper. As to contentions 2 and 3, we are unable to say, under all the facts and circumstances disclosed, that the punishments are excessive. (American Cigar Co. v. Berger, 221 Ill. App. 332, 337; Hoeffken v. Belleville Trades & Labor Assembly, 229 Ill. App. 28, 35); or that in their imposition there was any abuse of the discretion vested in the trial court. (Ash-Madden-Rae Co. v.

<u>International Ladies' Garment Workers' Union</u>, 290 Ill. 301, 306.

Finding no reversible error in the record the order of the Superior court, entered April 5, 1924, as to Jennie Lieberman, is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

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HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al.,
Defendants.

IN RE CONTEMPT PROCEEDINGS AGAINST ALMA JONES,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 640

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 5, 1924, the Superior court entered an order adjudging Alma Jones guilty of contempt of court for violating an injunction against picketing, etc., committing her to jail for fifteen (15) days, or until discharged according to law, and also assessing against her a fine of $200, - she to be confined in jail until said fine and the costs of the proceeding be paid, or until she be discharged according to law. By this appeal she seeks to reverse the order.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartnerships, engaged in the business of making and selling ladies' dresses and garments on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers; that the defendant Union and locals, Nos. 5, 18, 59, 81 and 100, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike

22 - 20870

HENRY MATTHEWS, a corporation,
et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION et al.,
Defendants,

IN RE CONTEMPT PROCEEDINGS AGAINST
ALMA JONES,
Appellant.

APPEAL FROM
WAYNE COUNTY,
IOWA COURT.

MR. JUSTICE GEORGE MILLER DELIVERED THE OPINION OF THE COURT.

On April , 1950, the Iowa Legislature [illegible] adopting Alma Jones guilty of contempt of court for violating an injunction against picketing [illegible], sentencing her to jail for fifteen (15) days, or until [illegible] in [illegible], and also assessing against her a fine [illegible] in jail until the fine and costs of the proceeding be paid, or until she is [illegible] working in jail. In lieu [illegible] seeks to review the order.

In Constitutional [illegible] 1951, it is alleged in substance [illegible] or [illegible] ships, engaged in the business [illegible] dresses and [illegible] Ohio, [illegible] Delaware, Ohio, etc., where they employed [illegible] that the Intervenor Union is [illegible] Nos. , 1, 2, 21 and 22, are voluntary [illegible] members are members; that the other defendants are officers, agents or members of the various local organizations; and that on February 27, 1950, said local organizations instituted a [illegible]

of its members, some of whom were employed by complainants and other similar concerns located nearby, and defendants had caused and were causing the premises of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be threatened, and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc.

On March 4, 1924, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaining pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or inducing persons, employed by complainants, not to go to or from said premises; (e) from addressing or referring to any of complainants' employes as "scabs" or applying to them other offensive epithets; and (f) from advising, encouraging or assisting in the doing of any such things.

On March 25, 1924, on motion of complainants, the court, after considering the affidavit of Albert M. Manley, other affidavits and complainants' sworn bill, ordered that a writ of attachment issue forthwith to bring before the court "Mary Roe (whose true name is unknown) to be pointed out by Albert M. Manley, * * to answer for the contempt of this court for the alleged violation of the injunction ordered by this court." In Manley's affidavit, sworn to on March 25th, it is stated in substance that he is a deputy sheriff, assigned to strike duty on South Market street, Chicago; that about noon on March 21st, he saw one Sherer, another

deputy, hand a printed copy of the injunction writ "to a colored striker whose face has become familiar to me, and whom I could pick out on sight, but whose name and address is unknown;" and that he has seen said striker picketing and patrolling from day to day in front of the premises of complainants between the hours of 8 a. m. and 3 p. m., before and since the serving of said injunction writ. Shortly after the entry of the order, appellant was arrested under said writ and brought into court, and subsequently she filed an answer to the rule, subscribed by her as Alma Jones but not sworn to, in the first paragraph of which she alleges that the same is made "in obedience to the rule entered on her to show cause why she should not be adjudged guilty of contempt for violating the order of injunction." It does not appear that she ever, either personally or by counsel, moved to quash the writ of attachment on any ground, although, after making certain statements on her answer as to her arrest and what happened in court when she was brought before the judge, she says: "Therefore, this respondent moves the court for an order quashing the writ and discharging her from custody." In her answer, also, she states that she knows of her "being charged in general terms with having picketed," denies that she addressed insulting language or opprobrious epithets to any of complainants' employes, and alleges that she has done nothing that can be construed as a violation of the injunctional order "unless her mere presence in the vicinity of the places of business of complainants can be construed as a violation thereof."

On April 1, 1924, there was a hearing at which appellant and her counsel were present. Complainants introduced in evidence Manley's affidavit and two other affidavits, and five witnesses testified in their behalf. Appellant's answer to the rule was read to the court, and she was called as a witness in her own behalf. She testified that she was a garment worker; and, prior to the time the strike was called, she had been employed by a firm on South

[illegible]

[illegible]

[illegible]

Market street; that she had gone out on the strike and had not returned to her work. She admitted that since the strike she frequently and in the mornings had picketed in front of the premises of Stein and Seiden, one of the complainants, employing many colored garment workers, and urged many of these employes t to to go out on the strike. She denied ever having threatened any of them with bodily harm in case they did not, or having addressed to them offensive epithets. She stated on cross-examination that, notwithstanding the injunction she felt it was her duty as a striker to picket and that she intended to picket.

At the conclusion of the hearing the order appealed from was entered, in which, after reciting the prior proceedings, the court found in substance that on March 21st respondent had been handed a printed copy of the injunction writ; that then and thereafter there was posted on complainants' premises, within view of those passing, other printed copies; that prior to and since the issuance of the writ respondent was and is now a member of the defendant union; that after the writ was served upon her she wilfully violated the injunction, (a) in that on various days and at various hours she patrolled and picketed in front of the premises of Stein and Seiden, and especially on March 21st, 22nd and 24th, 1924, between the hours of 8 and 9 a. m., and (b) in that, while so patrolling and picketing, she interfered with their employes as they were entering their place of employment, and called them "scabs" and other opprobrious names, and attempted to talk to them and urge them not to go to work; and that while testifying on the hearing "she stated that she intended to continue to picket and patrol in front of thepremises."

Counsel for appellant contend that the affidavits, which were the basis for the issuance of the attachment writ, were insufficient and that the writ should have been quashed; and further

that the court did not have jurisdiction of the person of respondent at the time of the hearing and, hence, the order appealed from should be reversed. In our opinion both contentions are without merit. Under the conditions existing at the time of the issuance of the attachment writ the affidavits clearly were sufficient to form the basis for its issuance, and to arrest "Mary Roe," - respondent's real name not then being known. Furthermore, after her arrest, neither respondent (released on her own recognizance) nor her counsel made any motion to quash the attachment writ, but treated the order therefor, supported by said affidavits, as a rule upon her to show cause why she should not be punished for contempt for violating the injunction, and said affidavits clearly were sufficient to warrant the issuance of such a rule. (Hake v. People, 230 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367.) And by her filing an answer to the rule, on the merits, she waived all objections to the court's jurisdiction over her person. (MacKenzie v. MacKenzie, 141 Ill. App. 126, 132; aff'd. 238 Ill. 616, 623; Nicholas v. People, 165 Ill. 502, 504; Louisville and Nashville R. Co. v. Industrial Board, 282 Ill. 136, 141.) And in said answer she states that she has knowledge of the charges, in a general way, which she is called upon to meet, and it clearly appears that afterwards on the hearing she was given full opportunity to meet them. (Hake v. People, supra; Hymen Bros. v. International Ladies' Garment Workers' Union, No. 29,577, opinion of this appellate court, filed June 9, 1925.)

Counsel state that "the court erred in punishing her for her intention to offend instead of limiting the sentence to past offenses," and, apparently, reach this conclusion because of one of the court's findings that on the hearing "she stated that she intended to continue to picket and patrol in front of the premises."

No such conclusion can properly be deduced from such finding or the entire order. That she had the intention, before she was arrested, to continue to picket and patrol, notwithstanding the injunction, is apparent from the evidence, and particularly from the testimony of complainants' witness, Sherer, to the effect that when, on March 21st, he handed her a printed copy of the injunction writ, explained its contents and told her to stop picketing, "she said she didn't care."

As to counsels' further contention that a sentence of imprisonment for a civil contempt is improper and erroneous, it is sufficient to say that the decisions of our Supreme Court are to the contrary. (Hake v. People, 230 Ill. 174, 186; Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 205.) And we cannot hold, as urged, that the court, under all the facts and circumstances in evidence, abused its discretion in sentencing respondent to jail for 15 days and also imposing a fine of $200 upon her, or that the punishment imposed was excessive. (Hoeffken v. Belleville Trades & Labor Assembly, 229 Ill. App. 28, 35; Ash-Madden-Rae Co. v. International Ladies Garment Workers' Union, 290 Ill. 301, 306; American Cigar Co. v. Berger, 281 Ill. App. 332, 337.)

Finding no reversible error in the record the order of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

4-106a

35 - 29672

HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
Defendants.

IN THE MATTER OF THE CONTEMPT PROCEEDINGS AGAINST CLARA GABINS,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

240 I.A. 640

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Clara Gabins seeks to reverse an order of the Superior court of Cook county, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, etc., assessing a fine of $125 against her, together with costs, and ordering her to be confined in jail until said fine and costs be paid or until she be discharged according to law.

In complainants' sworn bill, filed March 3, 1924, it is alleged in substance that they are corporations or copartnerships, engaged in the business of making and selling ladies' dresses and skirts on South Market street, near Jackson boulevard, Chicago, where they employ numerous garment workers; that the defendant Union and locals 5, 18, 59, 81 and 100, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents, representatives or members of the various local organizations; and that on February 27, 1924, said local organizations instituted a general strike of its members, some of whom were employed by complainants and other similar concerns located nearby, and defendants had caused and were causing the premises

of complainants and the other concerns to be picketed, their employees who did not go out on the strike to be threatened, and the sidewalks and streets near said premises to become so congested as to prevent customers from entering the same, etc. On March 4, 1924, following the prayer of the bill, the court issued a temporary injunction which, among other things, restrained the defendants, and all associations, unions and other persons, aiding, assisting or conspiring with them and having knowledge of the injunction, (a) from picketing or maintaining pickets at or near complainants' premises; (b) from patrolling or congregating in front of or in the vicinity of said premises in furtherance of picketing; (c) from soliciting or inducing persons, or attempting to do so, by threats, force, violence or coercion, not to enter into, or continue in, complainants' employ; (d) from assaulting, menacing, threatening or inducing persons, employed by complainants, not to go to or from said premises; (e) from injuring or attempting to injure complainants' property; and (f) from advising, encouraging or assisting in the doing of any such things.

On March 13, 1924, on motion of complainants, the court, after considering the affidavits of Albert N. Manley and others (dated March 12, 1924) and the bill of complaint, ordered that writs of attachment issue forthwith to bring into court Clara Gabins (appellant and a defendant named in complainants' bill) and two other women "to answer for the alleged violation of the injunction ordered by this court." Some time later appellant was brought into court and subsequently she filed an answer to the rule, signed and sworn to on March 18, 1924, in the first paragraph of which she alleges that the answer is made "in obedience to the rule entered on her to show cause why she should not be adjudged guilty of contempt for violating the order of injunction." It does not

of complainants and the other honorees to be picketed, their employees who did not go out on the strike to be threatened, and the sheriffs and attorneys their aids procured [illegible] to be commanded to be present at strikers' [illegible] etc.

On March 4, 1904, following the prayer of the [illegible], the court issued a temporary injunction [illegible], among other things, restrained the defendants, and all [illegible] thereof, and other persons, aiding, assisting or conspiring with them, from the having knowledge of the injunction, [illegible] from doing or [illegible] plaints at or near complainants' premises; (b) from picketing or congregating in front of or in the vicinity of [illegible] premises in furtherance of picketing; (c) from molesting or intimidating persons, or threatening so to do, by threats, force, violence or coercion, not to enter into, or continue in, peaceful and lawful employment; (d) from assaulting, [illegible], slander or intimidate employees by conspiracy, [illegible] from injuring or destroying or injuring, or causing injury to property; and (e) from [illegible] and lying, conspiring or assisting in the doing of any such things.

On March 14, 1904, on motion of complainants, the court, after considering the affidavits of [illegible] Crosby and others (dated March 18, 1904) and the [illegible] of [illegible], ordered upon writs of attachment issued for [illegible] in a court [illegible] orders (supplied and [illegible]) [illegible] and the other women [illegible] the injunction [illegible] by [illegible] brought into court and [illegible] "[illegible] to [illegible] signed the [illegible] on March 14, 1904, in the [illegible] which the [illegible] entered on [illegible]. In [illegible] of contempt for violating the order of injunction. [illegible]

appear that she ever, in person or by counsel, moved the court to quash the writ of attachment issued against her on any ground, although, after making certain statements as to what happened in court when she was brought before the judge, her answer contains the words, "therefore this respondent moves the court for an order quashing said writ and discharging her from custody." In her answer, also, she states that she knows that she has been charged with violations of an injunction against picketing; that she does not know exactly what the word means, but that, "if by picketing is meant that she was present in the vicinity of the places of business of complainants, she admits she was in the proximity;" that she did not address employes of complainants with insulting language or opprobrious epithets; and that she did not violate said injunction "unless her mere presence in the vicinity of complainants' places of business can be construed as a violation thereof."

On March 26, 1924, there was a hearing in open court at which appellant and her counsel were present. Complainants introduced in evidence the said affidavit of Albert E. Manley, and the affidavits of eleven other persons. And three witnesses testified for complainants, all being cross-examined by appellant's counsel. Appellant testified as a witness in her own behalf, and her answer to the rule, above referred to, was read in evidence. At the conclusion of the hearing the court entered the order appealed from, in which, after reciting the filing of complainants' bill and the issuance of the injunction, the court found in substance that Clara Gabins was served with a copy of the injunction writ on March 6, 1924; that she was by occupation a dressmaker, and was a member of the defendant Union, both before and after the issuance of the injunction; that from March 6th to March 12th, 1924, inclusive, she willfully violated the injunction by repeatedly

patrolling and picketing in front of and along the place of business of Hymen Brothers, a corporation, one of the complainants, and by approaching its employees and in a boisterous manner admonishing and instructing them against returning to work for it; and that on or about March 6, 1924, she approached George Wolf, an employee of said Hymen Brothers, and told him that one Sam Goldstein, also an employee of that corporation, had better keep off Market street, on which street he was employed and said corporation located, or he would be harmed or something would happen to him, and that on or about March 8, 1924, she approached said Goldstein and made substantially the same statements to him, and that in making said approaches and statements she willfully violated said injunction.

Counsel for appellant first contend that the evidence is insufficient to support any of the court's findings. We deem it unnecessary to set forth in detail complainants' evidence, as disclosed in the many affidavits introduced by them and in the testimony of their witnesses, or to set forth the somewhat contrary testimony of appellant. Suffice it to say that after a careful reading of the affidavits and all of the testimony, as set forth in the abstract, we are of the opinion that all the findings of the court are sustained by a great preponderance of the evidence.

Appellant's counsel also contend that the court did not properly acquire jurisdiction of her person. The argument is that the Manley affidavit and the other affidavits (which were dated March 12th and which the court considered on the motion for the issuance of the attachment against her) were insufficient to form a basis for the attachment, and hence it was issued improperly and should have been quashed. We cannot agree with the contention or argument. In our opinion the affidavits were sufficient to warrant the issuance of the attachment. Furthermore, no motion was made at any time in the trial court to quash the attachment

[illegible]

[illegible]

[illegible]

on any ground, but the order therefor, supported by said affidavits, was treated by appellant and her counsel as a rule on her to show cause why she should not be punished for contempt for violating the injunction, and the affidavits clearly were sufficient for that purpose. (Hake v. People, 230 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367; Flannery v. People, 225 Ill. 62, 68.) By her answer to such rule it appears that she knew in a general way the charges she was called upon to meet, and subsequently she was given ample opportunity to meet them. (Hymen Bros. v. International Ladies' Garment Workers' Union, No. 29577, opinion of this appellate court, filed June 9, 1925.) Furthermore, by filing an answer to such rule, on the merits, she waived all objections to the jurisdiction of the court over her person. (MacKenzie v. MacKenzie, 141 Ill. App. 128, 132; affirmed, 238 Ill. 616, 623; Nicholas v. People, 165 Ill. 502, 504.)

Appellant's counsel further contend that the fine of $125 imposed upon her is excessive. Under the facts and circumstances disclosed by the evidence we cannot say that it is excessive. In fixing the punishment at such a fine there was no abuse of the court's discretion. (American Cigar Co. v. Berger, 231 Ill. App. 299; Same v. Same, 221 Ill. App. 332.)

The order of the Superior court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

on any ground, but the [illegible] could exist where
was created by [illegible] to show
cause why one should not [illegible] constitutionality, the
injunction, and the [illegible] for the
purpose. (Ex parte [illegible], [illegible] Cal. 17, 1-3; [illegible] v. [illegible],
216 Ill. 384, 387; [illegible] v. [illegible], [illegible] Cal. [illegible], [illegible]
answer to such rule it appears [illegible] be
charges are [illegible] [illegible]
ample opportunity to [illegible] [illegible] v. [illegible],
[illegible] Bureau [illegible] Co., [illegible] [illegible]
court, filed June 9, 1938.) [illegible] by [illegible]
such rule, or [illegible]
diction of the [illegible]
141 Ill. app. 320, [illegible] [illegible]
[illegible], 146 Ill. [illegible], 3[illegible].)

[illegible]
imposed upon [illegible]
dismissed by [illegible]
filing the [illegible]
county's discretion. [illegible]
289; [illegible] v. [illegible], [illegible] App. [illegible].)

The order of the [illegible]

[illegible]

Barnes, P. J., and Fitton, [illegible], concur.

39 - 29676

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS OF
THE INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, et al.,
Defendants.

Consolidated appeals

From Superior Court

of Cook County.

240 I.A. 640

ON APPEAL OF KATE MILLER,
Appellant.

Consolidated for hearing on similar
appeals of ELEANOR SADLOWSKA,
No. 29680, and ALBINA CAG, No. 29691.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By this appeal Kate Miller seeks to reverse an order of the Superior court of Cook county, entered May 29, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued on March 17, 1924, and committing her to jail for sixty (60) days, unless sooner discharged by law, and also imposing upon her a fine of $250, - she to be confined in jail, not exceeding four months, until the fine be paid, or until she be discharged according to law. Similar orders were entered as to Eleanor Sadlowska and Albina Cag, separate appeals were perfected, and, by agreement, the three appeals were consolidated for hearing in this appellate court.

In complainants' sworn bill, filed March 6, 1924, it is alleged in substance that they are corporations or copartnerships, engaged in the business of making and selling ladies' dresses and garments, and located near the corner of West Adams and South Market streets, Chicago, and in a district where many makers of such garments have their places of business; that complainants

KNAUSER MOTOR COMPANY,
a corporation, et al.,
Complainants-Appellees,

v.

JOINT BOARD OF CHICAGO LODGES OF
THE INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, et al.,
Defendants.

Consolidated causes

From District Court
of the United States.

ON APPEAL OF RATE BILLING.

Appellant,

Consolidated for hearing on motions
appeals of MIRACOR CANADA,
No. 28020, and SAMUEL GOL, No. [illegible]

MR. JUSTICE CHARLES EVANS WHITTAKER delivered the opinion of the court.

By this appeal Rate Billing seeks to be in error an order of the Superior Court of Cook County, entered May 24, 1967, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued on March 17, 1966, and committing her to jail for sixty (60) days, unless sooner discharged by law, and also imposing upon her a fine of $500, - she to be confined in jail, not exceeding four months, until the fine be paid, or until she be discharged according to law. [illegible] and to Illinois Bankruptcy and Crime Act, respectively, [illegible] perfected, and, by agreement, the cases were consolidated for hearing in this appellate court.

In complainants' amended bill, filed March 8, 1966, it is alleged in substance that they are [illegible] and engaged in the business of making and selling [illegible] and garments, and located near the corner of [illegible] and [illegible] Martin streets, Chicago, and in a different [illegible] such garments have their place of business; that complainants

employ numerous garment workers; that the defendant Union and Locals Nos. 5, 18, 54, 59, 81, 100 and 104, are voluntary associations of which many garment workers are members; that the other defendants are officers, agents or members of said local organizations; that the defendant, Joint Board, etc., represents and manages the conduct and affairs of said local organizations; that about February 27, 1924, said local organizations instituted a general strike of its members, some of which were employed by complainants and other similar concerns, and caused the premises of complainants and other concerns to be picketed and various of their employes to be threatened with bodily harm in case they did not join in said strike, etc.

On March 7, 1924, the court issued a temporary injunction which, among other things, restrained the defendants, and all officers, agents or members of said Joint Board and of said local organizations, and all other associations and persons, aiding, assisting or conspiring with them and having knowledge of said injunction, (a) from picketing or maintaining pickets at or near complainants' premises, or along the routes used by persons in going to or from said premises, or at or near the homes of any of complainants' employes; (b) from watching, following, stopping, assaulting, beating, threatening, menacing, molesting or interfering with any of complainants' employees, or persons seeking to enter the employment of any of the complainants, or persons doing business or seeking to do business with any of them; (c) from calling, addressing or applying to any of complainants' employes any profane, insulting or humiliating epithet, name or term; (d) from soliciting or inducing any employes of complainants to quit their employment; and (e) from recommending, encouraging or assisting in the doing of any such acts.

On May 21, 1924, on complainants' motion, the court,

employ numerous persons [illegible] for [illegible] union and Local Nos. 3, 18, [illegible], 7B, [illegible] [illegible] voluntary associations of which many current members are members, that the other defendants are officers, agents or members of said local organizations; that the defendants, later [illegible], and [illegible] and manager the managed and [illegible] of said local organizations; that about February 27, 1962, said local organizations [illegible] a general strike of the members, some of which were employed by complainants and other similar concerns, and [illegible] the operations of complainants and other concerns to be [illegible] and violence of their employees to be threatened which had [illegible] they did not join in said strike, etc.

On March 7, 1962, the court issued a temporary injunction which, among other things, restrained and enjoined the defendants, and all officers, agents or members of said Joint Co-op [illegible] local organizations, and all other associations and persons, [illegible] maintaining or conspiring with them and having knowledge of said injunction, (a) from picketing or [illegible] inflicting violence on complainants' premises, or along [illegible] or from said premises, or [illegible] the ingress of and of complainants' employees; (b) from molesting, intimidating, [illegible] assaulting, beating, threatening, [illegible], [illegible] forcing with any of complainants' employees, or [illegible] enter the employment of any of the said Joint [illegible] business or seeking to do [illegible] [illegible] addressing or applying to any of said Joint [illegible] intimidating or threatening [illegible], [illegible] or threatening any employee of complainants to quit [illegible] and (c) from recommending, ordering or [illegible] of any such acts.

On May 21, 1962, on complainants' motion, the court,

after considering the affidavits of Robert Logan, Julian J. Sullivan, Lilly Winters and Patrick Moran, (dated either May 19th or May 20th) and after said three respondents, Kate Miller, Eleanor Sadlowska and Albina Cag, had entered their appearances by counsel in open court, ordered that rules be entered on said respondents to show cause why they should not be punished for contempt of court for violating said injunction, as charged in said affidavits, on or before 10 o'clock on the following morning. The record does not disclose that any of the respondents filed answers to the rules, but on May 22, 1924, there was a hearing in open court, at which all three respondents were present and represented by counsel. Complainants introduced in evidence said four affidavits, and presented the four affiants as witnesses, as well as one Ida Abrams, and they were examined and cross-examined at length. Kate Miller and Eleanor Sadlowska testified as witnesses in their own behalf, but Albina Cag, although present, did not testify, after opportunity given her so to do.

Following the hearing the orders appealed from were entered, in which the court, after reciting the prior proceedings, found as to Kate Miller that on March 8, 1924, she was, ever since has been, and is now a member of Local 100, one of the local organizations; that on or before May 17, 1924, she had notice of said injunction and of the contents thereof; that on May 17th she violated the injunction, "in that she did on said day in conjunction with others, with great force and violence, assault and beat said Lilly Winters, who was then and there an employe of the Francine Frock Co., one of complainants, while said Lily Winters was on her way to her place of employment, and did strike her on the head, knocking her to the ground and rendering her unconscious." Similar findings, in almost identical language, appear in the orders concerning Eleanor Sadlowska and Albina Cag.

after considering the evidence of [illegible], Judge [illegible] decision, Lily Pickers [illegible] [illegible] either May 19th or May 20th) and after [illegible] [illegible], Beta Pelican, Leader Publications and Albert [illegible], and various Lily [illegible] witnessed in open court, ordered that [illegible] [illegible] be made respondents to show cause why they should not be punished for contempt of court for violating said injunction, -- in [illegible] "Leader", on or before 10 o'clock on the following morning. The record does not disclose that any of the respondents filed answers to the rules, but on May 22, 1934, there was a hearing in open court, at which all three respondents were present and represented by counsel. Respondents introduced in evidence only two affidavits, and presented the four affidavits of attorneys, [illegible] [illegible] Brown, [illegible] They were examined and cross-examined at length. Mrs. Lilly and Daniel Andrewski testified as witnesses in their own behalf, and Miss Cox, although present, [illegible] [illegible] [illegible] [illegible] so to do.

Following the hearing the [illegible] [illegible] from were entered, in which the court, after [illegible] the prior proceedings, found as to Beta Pelican that on [illegible], 1934, [illegible], [illegible] had been, and is now a member of Local 167, one of the local organizations, [illegible] [illegible] [illegible] [illegible] made injunction and of the [illegible] [illegible] May 17th was violated the injunction, [illegible] [illegible] in connection with other [illegible] [illegible] and violence, [illegible] [illegible] Lily Pickers, [illegible] [illegible] [illegible] [illegible] Co., one of complainants, [illegible] [illegible] [illegible] [illegible] way to her place of employment, and did strike her on the head, knocking her to the ground and committing her unconscious. Similar findings in minor identical language, signed in the orders concerning Leader Publications and Albert Cox.

It appears from the affidavit of Lily Winters, and from her testimony in open court, that she resided on Oak avenue in Evanston, Illinois, and was employed by the Francine Frock Co. as forewoman; that early on Saturday morning, May 17, 1924, she left her residence and walked east on Davis street, intending to take the elevated railroad to go to her place of employment; that just as she reached the corner of Benson avenue and was about under the viaduct of the railroad three women (whom she did not know but afterwards identified as being the three respondents) approached her, and one of them (Albina Cag), carrying a broom-stick covered with newspaper, and without previous conversation, hit her with said stick over the head and knocked her down, rendering her temporarily unconscious; and that she sustained painful injuries to her head, arm and shoulder, causing her absence from her place of employment for several days. It appears from the affidavits and testimony of Julian J. Sullivan (a police officer) and Robert Logan, that early on said morning, being on Davis street near said corner, they heard screams, ran to the corner, found Mrs. Winters lying on the sidewalk in an unconscious condition, noticed three women running rapidly north on Benson avenue and pursued them; that Sullivan arrested one, who later gave her name as Albina Cag; that shortly thereafter the witnesses found the other two attempting to hide in an alley running into Church street, the first street north of Davis street; that the other two women also were arrested and taken to the police station where they gave their names as Kate Miller and Eleanor Nadlewskn; and that the witness, Logan, recognized the two as those whom he first saw running away from said corner. It appears from the affidavit and testimony of Patrick Moran (an investigator employed by complainants after the institution of the strike) that he had been in the strike district and near complainants' premises every working day since

March 8th; that between that day and March 15th, he repeatedly saw all three respondents picketing and patrolling back and forth in front of the premises of complainants and others; that he saw them at the Evanston police station on May 17th, and that each then informed him that they were striking garment workers and members of said local union, No. 100; and that after March 8th copies of the injunction writ were posted conspicuously at the front entrance to the places of business of complainants and others, and could easily be seen from the sidewalk. Moran testified to further facts, showing clearly that all three respondents had knowledge of the injunction shortly after its issuance; that on the morning of May 17th, after they had been taken to the Evanston police station, he heard respondent Miller telephoning to one Rappaport to the effect that respondents had been arrested and were in trouble, and further saying, "You know what we were out here for; * * get us out of here;" and that during the afternoon respondents were released on bail. The testimony of Kate Miller and Eleanor Sadlowska was that they had left their homes in Chicago very early and had gone separately on personal business to Evanston; that they were not acquainted with one another, though members of local Union No. 100; but their statements, as to why they, in company with Albina Cag, happened to be at the same corner at the same time and why, after the assault on Mrs. Winters, they all attempted to run away, were unconvincing. Kate Miller further testified that after respondents had been taken to the police station she telephoned to <u>the secretary of local union No. 100</u>, Mr. Rappaport, saying, "<u>We</u> are under arrest * * send some one to get <u>us</u> out;" that later bail bonds were signed and all three respondents were released; that she telephoned Rappaport because he was generally at the union headquarters and because he would get her out; and that "they tell us when we get into trouble to call Mr. Rappaport." Eleanor Sadlowska further testified that after

Marsh Gas; that between the [illegible] and [illegible], an opportunity was all there respondents [illegible] and [illegible] and forth in front of the premises of respondents. As witness, that he saw them at the [illegible] [illegible] or [illegible], and that each then informed him that they were [illegible] [illegible] and members of said local union, [illegible] [illegible] with copies of the injunction [illegible] [illegible] the front entrance to the plant [illegible] and others, and said [illegible] [illegible] entitled to further [illegible], whereupon [illegible] respondents had knowledge of the injunction [illegible] immediately; that on the morning of [illegible] [illegible] taken to the [illegible] [illegible] telephoning to the [illegible] been arrested and were in trouble, and [illegible] "You know what we were out here for; [illegible] or [illegible]" [illegible] the defendant respondents were [illegible] [illegible]. [illegible] testimony of Jack Miller and "Jeanne" [illegible] [illegible] home in Chicago very early and [illegible] business to [illegible] [illegible] another, though members of local [illegible] [illegible] [illegible] merits, as to why they, in leaving [illegible] [illegible] at the same [illegible] [illegible] [illegible] on Mrs. [illegible], they [illegible] [illegible] State Miller further testified that after [illegible] [illegible] to the police [illegible] [illegible] [illegible] No. 100. Mr. Kaufmann, [illegible] [illegible] [illegible] one to get in only; [illegible] respondents were [illegible]; that the [illegible] [illegible] was generally at the union [illegible] [illegible] [illegible] but only; and that they [illegible] [illegible] [illegible] Mr. Kaufmann." [illegible] testimony [illegible] [illegible]

her arrival in Evanston that morning she met Albina Cag at said corner and had a conversation with her, and after going a few steps away she turned around and saw her and Mrs. Winters fighting and then she ran away, because she was afraid of a "bunch of negroes," and was afterwards arrested "in a garage in a back yard."

Counsel for appellants contend that the findings of the court, as to Kate Miller and Eleanor Sadlowska, that they committed any assault and battery upon Mrs. Winters in violation of the injunction, are not supported by the evidence. We cannot agree. It sufficiently appears that all three respondents acted in concert in making an assault upon Mrs. Winters, who was employed in an important position by one of the complainants and who that morning was on the way to her place of employment. While it appears that the blow, which knocked Mrs. Winters down and rendered her temporarily unconscious and unable for a considerable time to perform the duties of her position, was struck by Albina Cag, the latter's act, under the facts and circumstances in evidence, is to be considered as the act of all three respondents, and for a purpose clearly apparent. (Christensen v. People, 114 Ill. App. 40, 72.) And in our opinion there is no merit in counsels' further contention that the findings of the court, that all three respondents violated the injunction of the terms of which they had knowledge, are not sufficiently supported by the evidence.

Counsel further contend that the affidavits, which formed the basis of the entry of the court's rule on the respondents to show cause, etc., do not charge them specifically with any intent to violate the injunction, nor do they show that any of complainants was prejudiced or damaged by the acts of respondents. These contentions are also without merit. The intent of respondents to violate the injunction can clearly be inferred from the facts as stated. It was not necessary to specifically allege such

her arrival in America that morning she met Hilton Jackson and
corner and had a conversation with him. [illegible] a few
steps away she turned around and [illegible] him and [illegible]
and then she ran away, leaving the [illegible] of
weapons," and was afterwards arrested [illegible] a [illegible] warrant.

Counsel for appellants contend that the findings of the
court, in its brief [illegible] lawful authority, that they constitute
any assault and battery upon Mrs. [illegible] as violations of the ordinance
quoted, are not supported by the evidence [illegible] to convict [illegible].
It sufficiently appears that [illegible] in making an assault upon Mrs. [illegible], and [illegible] in an
important position by one of the [illegible] and the [illegible]
was on the way to her place of employment. [illegible] the
the plea, which included Mrs. [illegible] own [illegible]
temporarily unconscious and unable for a considerable time to [illegible]
form the duties of her position, [illegible] to [illegible], the
latter's act, under the facts and circumstances in evidence, is to
be considered as the act of a [illegible] intoxicated, and for a [illegible]
more clearly apparent. (Commonwealth v. [illegible], [illegible], [illegible] 90,
72.) And in our opinion there is no merit to [illegible] that
contention that the findings of the court, that [illegible] author-
ities violated the ordinance of the [illegible] [illegible] that
knowledge, are not sufficiently supported by the evidence.

Counsel further contend that [illegible], which forced
the basis of the entry of the [illegible] warrants or [illegible]
to show cause, etc., is not charge that [illegible] the
test to violate the ordinance, nor is it [illegible] [illegible]
complainants [illegible] or charged by [illegible] [illegible].
These contentions are also [illegible]. The [illegible] of [illegible]
to violate the ordinance are clearly be [illegible] [illegible]
an offense. It was not necessary to specifically [illegible]

intent, and they were sufficiently advised of the charges they were called upon to meet and afterwards were afforded ample opportunity of meeting them. (Hake v. People, 230 Ill. 174, 192; O'Brien v. People, 216 Ill. 354, 367; Hymen Bros. v. International Ladies' Garment Workers' Union, No. 29577, opinion of this appellate court, filed June 9, 1925.) And the Francine Frock Co., one of the complainants, clearly suffered damages in that by respondents' acts it was deprived of the services for a considerable time of Mrs. Winters, its foreswoman, at a period when many garment workers were out on a strike.

And there is no force in counsels' further contention that a sentence of imprisonment cannot properly be entered in a proceeding for civil contempt, such as this was. (Hake v. People, 230 Ill. 174, 196; Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 205.) And, under the facts and circumstances shown, we cannot say that the trial court abused its discretion in ordering each respondent to be imprisoned for the period mentioned and also to pay the fine mentioned. (American Cigar Co. v. Berger, 221 Ill. App. 332; People v. Mussatto, 216 Ill. App. 519, 529.)

The order of the Superior Court appealed from, as to the respondent Kate Miller, should be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

intent, and they were sufficiently [illegible] were called upon to meet and afterwards were afforded ample opportunity of meeting them. (Sale v. [illegible], 222 Ill. [illegible]; O'Brien v. Ziegler, 152 Ill. [illegible] International Ladies' Garment Workers' Union, No. [illegible] court, filed Jan. 8, 1935.) [illegible] complainants, clearly [illegible] it was deprived [illegible] Without, the [illegible] out on a strike.

[illegible] a sentence of [illegible] ceeding for civil [illegible] Ill. 174, 180; [illegible] 205.) And, [illegible] that the trial [illegible] to be imprisoned [illegible] mentioned. ([illegible] v. Bennett, [illegible] 29.)

The order of [illegible] respondent [illegible]

[illegible]

Barnes, [illegible]

20 - 29606

4908

ROTH-WORSEY COMPANY,
a Corporation,
Appellee,

vs.

CHICAGO JOINT BOARD et al.

On Appeal in the Matter of
May Bencynski, Appellant,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

240 I.A. 640

PER CURIAM.

This is one of four appeals from an order of the Circuit court imposing a punishment on appellants for violating an injunction of that court. This case was tried with that of Eleanor Sadlowski, and the facts in this case are the same as in that case. The cases were consolidated and heard in this court upon the same record, abstracts and briefs.

For the reasons stated in the opinion filed in that case (Gen. No. 29605), the order of the Circuit court is affirmed.

AFFIRMED.

21 - 29607

4909a

ROTH-WORSEY COMPANY,
a Corporation,
Appellee,

vs.

CHICAGO JOINT BOARD et al.

On Appeal in the Matter of
Max Novak, Appellant,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

240 I.A. 641

PER CURIAM.

This is an appeal from an order of the Circuit court imposing a punishment on appellant for contempt of court in violating an injunction. The order is based upon the same evidence as the case against Eleanor Sadlowski, after a hearing upon a petition, affidavits, rule to show cause and answer similar to those in her case. The cases were heard together in the lower court, and by agreement, the separate appeals were consolidated in this court and heard upon the same record, abstracts and briefs.

For the reasons stated in the opinion filed in the case of Eleanor Sadlowski (Gen. No. 29605), the order of the Circuit court is affirmed.

AFFIRMED.

119 Oa

22 - 29608

ROTH-WORSEY COMPANY, a Corporation, Appellee, vs. CHICAGO JOINT BOARD et al. On Appeal in the Matter of Catherine Koppa, Appellant, Appellants.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

240 I.A. 641

PER CURIAM.

This is one of four appeals from an order of the Circuit court imposing a punishment on appellants for violating an injunction of that court. This case was tried with that of Eleanor Sadlowski, and the facts in this case are the same as in that case. The cases were consolidated and heard in this court upon the same record, abstracts and briefs.

For the reasons stated in the opinion filed in that case (Gen. No. 29605), the order of the Circuit court is affirmed.

AFFIRMED.

No. 8026

NOTH-FORMAT COMPANY,
a Corporation,
Appellee,

vs.

CHICAGO JOINT BOARD et al.,

On Appeal in the Matter of
Gabberlin Japan, Appellant,
Appellee.

Order.

This is one of four appeals from an order of the Circuit Court issuing a mandamus to compel the defendants to institute an injunction of that court. This case was tried with that of Hilmer Malstrom, and the facts in this case are the same as in that case. The order was substantially identical in the court upon the same record, differing only in [illegible].

For the reasons stated in [illegible] in the Malstrom case (Docket No. 8025), the order of the Circuit Court is affirmed.

Affirmed.

26 - 29663

491 1a

KYMEN BROTHERS, a corporation,
et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF ISIDORE KREEGER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 641

PER CURIAM.

By this appeal, consolidated for hearing with No. 29661, Isidore Kreeger seeks to reverse an order of the Superior court of Cook County, entered April 5, 1924, adjudging him guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924; imposing upon him a fine of $175, together with the costs of the proceeding; and ordering that he be confined in jail until payment of the fine and costs, or until discharged according to law.

For the reasons stated in the opinion in case No. 29661, this day filed, the order of the Superior court is affirmed.

AFFIRMED.

KEMPER MACHINERY, a corporation,
et al.,
Complainants and Appellees,

v.

INTERNATIONAL MACHINE COMPANY
SOMERSET WRIGHT, et al.,
Defendants.

ON APPEAL OF INJUNCTION PROCEEDING.
Appellant.

APPEAL FROM
APPELLATE COURT.
COOK COUNTY.

FOLIO 641

EX PARTE.

By this appeal, counsel ask for review with No. 20023, Indore Kemper seeks to reverse an order of the superior court of Cook County, entered April 6, 1924, enjoining the sale of contents of court for violating an injunction against plaintiffs, manufacturing, etc., issued March 4, 1924; imposing upon him a fine of $125, together with the costs of the proceeding; and ordering that he be confined in jail until payment of the fine and costs, or until discharged according to law.

For the reasons stated in the opinion in case No. 20021, this day filed, the order of the superior court is affirmed.

AFFIRMED.

4912

27 - 29664

HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF BESSIE KATZ,
Appellant.

240 I.A. 641

PER CURIAM.

By this appeal, consolidated for hearing with No. 29661, Bessie Katz seeks to reverse an order of the Superior court of Cook county, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924; imposing upon her a fine of $200, together with the costs of the proceeding; and ordering that she be confined in jail until payment of the fine and costs, or until discharged according to law.

For the reasons stated in the opinion in case No. 29661, this day filed, the order of the Superior court is affirmed.

AFFIRMED.

29 - 29666

4913a

HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 641

ON APPEAL OF SAM DORF,
Appellant.

PER CURIAM.

By this appeal, consolidated for hearing with No. 29661, Sam Dorf seeks to reverse an order of the Superior court of Cook county, entered April 5, 1924, adjudging him guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924; imposing upon him a fine of $175, together with the costs of the proceeding; and ordering that he be confined in jail until payment of the fine and costs or until discharged according to law.

For the reasons stated in the opinion in case No. 29661, this day filed, the order of the Superior court is affirmed.

AFFIRMED.

4914a

31 - 29668

HYMAN BROTHERS, a corporation,
et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS'
UNION, et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 642

ON APPEAL OF FREIDA REIKER,
Appellant.

PER CURIAM.

By this appeal, consolidated for hearing with No. 29667, Freida Reiker seeks to reverse an order of the Superior court, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924, and committing her to jail for 30 days, unless sooner discharged by law, and also imposing upon her a fine of $200, - she to be confined in jail until said fine and the costs of the proceeding be paid, or until she be discharged according to law.

For the reasons stated in the opinion in case No. 29667, this day filed, the order of the Superior Court is affirmed.

AFFIRMED.

No. 7.

Appellants,

v.

Appellees.

Appellants,

Appellees.

49/5a

32 - 29669

HYMEN BROTHERS, a corporation, et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF LENA MOVITZ,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 642

PER CURIAM.

By this appeal, consolidated for hearing with No. 29667, Lena Movitz seeks to reverse an order of the Superior court, entered April 5, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924, and committing her to jail for 20 days, unless sooner discharged by law, and also imposing upon her a fine of $300, - she to be confined in jail until said fine and the costs of the proceeding be paid, or until she be discharged according to law.

For the reasons stated in the opinion in case No. 29667, this day filed, the order of the Superior court is affirmed.

AFFIRMED.

KIRKEN NOTTA [illegible], a corporation,
et al.,
Complainants and appellees,

v.

INTERNATIONAL [illegible] OF [illegible]
WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF [illegible] MOTION,
Appellees.

By this appeal, consolidated for hearing with No. 20627, here [illegible] on review an order of the Superior court, entered April 5, 1920, [illegible] of contempt of court for [illegible] in violating [illegible] injunction, respectively. In, [illegible] June 4, 1920, and committing her to jail for 20 days, notice [illegible] by law, and also [illegible] [illegible] of [illegible], [illegible] be confined in jail until [illegible] the course of the proceeding be [illegible], or until [illegible] according to law.

For the reasons [illegible] in the opinion in [illegible] No. 20627, this day filed, the order of the [illegible] is affirmed.

AFFIRMED.

34 - 29671

HYMEN BROTHERS, a corporation,
et al.,
Complainants and Appellees,

v.

INTERNATIONAL LADIES' GARMENT WORKERS'
UNION, et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF JOSEPH KRAVITZ,
Appellant.

240 I.A. 642

PER CURIAM.

By this appeal, consolidated for hearing with No. 29661, Joseph Kravitz seeks to reverse an order of the Superior court of Cook county, entered April 5, 1924, adjudging him guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued March 4, 1924; imposing upon him a fine of $175, together with the costs of the proceeding; and ordering that he be confined in jail until payment of the fine and costs, or until discharged according to law.

For the reasons stated in the opinion in case No. 29661, this day filed, the order of the Superior court is affirmed.

AFFIRMED.

37 - 29674

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF MAMIE KUNZ,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

40 - 29677

491 8a

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of CAMILLE SERATE,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 643

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

41 - 29678

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of IDA SELKOFF,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 643

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

FRANCISCO PEDRO JIMENEZ et al.,
Complainants-Appellees and
Cross-Appellees,

vs.

JOHN MCKEE DR JULIAN LUJAN
etc., et al.,
Defendants-Appellees,

and

On the Appeal of THE MERCANTILE
Appellant.

E. Martin.

This case was tried in the District Court of Santa Fe County, the Honorable Marquez Waldo, Judge, Div. 1, 1970, judgment was entered after trial, all being appealable from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. That we have said in our opinion in the [illegible] of Marquez Waldo, Div. 1, No. 9078, in which this is more clearly to this, and for the reasons therein stated [illegible] in this case will be affirmed.

[illegible]

42 - 29679

49202

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF ALFONSO GRANAR,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I A 643

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

FRANKLIN LOCK COMPANY,
a corporation, et al.,
Complainants,

v.

JOINT BOARD of Management [illegible],
etc., et al.,
Defendants.

ON APPEAL OF ALBERTO [illegible],
[illegible].

[illegible]

This case [illegible] for [illegible] of Iowa Nevada in [illegible] 30, 1973, [illegible] together with [illegible] order for [illegible] in the above entitled [illegible] in the case of Iowa [illegible], 30, 1973, [illegible] applicable in every [illegible] state the judgment in this case [illegible].

[illegible]

43 - 29680

49216

FRANCINE FROCK COMPANY,
a Corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS OF
THE INTERNATIONAL LADIES' GARMENT
WORKERS' UNION et al.,
Defendants.

6

ON APPEAL OF ELEANOR SADLOWSKA,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 643

PER CURIAM.

By this appeal, consolidated for hearing with No. 29676, Eleanor Sadlowska seeks to reverse an order of the Superior Court, entered May 29, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued on March 17, 1924, and committing her to jail for sixty (60) days, unless sooner discharged by law, and also imposing upon her a fine of $250, - she to be confined in jail, not exceeding four months, until the fine be paid, or until she be discharged according to law.

For the reasons stated in the opinion in case No. 29676, this day filed, the order of the Superior Court is affirmed.

AFFIRMED.

PRAGUETTE FOOD COMPANY,
a Corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL Locals of
THE UNITED VINEGAR Local 1, et al.,
SORTERS' UNION et al.,
Defendants.

ON APPEAL OF [illegible]
[illegible]

FILED

[illegible]

MR. JUSTICE [illegible]

By this appeal, consolidated for hearing with No. 23873, Gimmer Middlebrooks seeks to perfect an appeal of the Superior Court, entered May 24, 1971, granting her motion of contempt of court for violations of injunctive against picketing, demonstrating, etc., issued on March 17, 1971, and committing her to jail for sixty (60) days, unless sooner discharged by law, and also issuing upon her a rule of [illegible] - she to be confined in jail, not exceeding [illegible] until the fine be paid, or until she be discharged according to law.

For the reasons stated in the opinion in [illegible] No. 23873, this day filed, the order of the [illegible] court is affirmed.

AFFIRMED.

44 - 29681

4922

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

ON APPEAL OF CARRIE SIEVERS,
Appellant.

240 I.A. 644

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

THANKSGIVING BROOK COMPANY,
a corporation, et al.,
Appellants and Appellees,

v.

JOHN BRAND OF [illegible] LOCALE,
etc., et al.,
Defendants.

ON APPEAL OF DAVID DIAZ,
Appellant.

Per Curiam.

This case is a consolidation for hearing with the appeal of Rose Hurtle in case no. 20021, [illegible] as stated above, together with [illegible] appeals from or other interlocutory [illegible] injunction issued in the [illegible] matter. [illegible] said in our opinion in the case of Rose Hurtle, [illegible], this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case [illegible] be affirmed.

AFFIRMED.

45 - 29682

4123

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 644

ON APPEAL OF FANNIE GOLDBERG,
Appellant.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

TRANSITS TRUCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF YANKIS SOLICITORS,
Appellants.

APPEAL FROM
UNITED STATES DISTRICT
COURT DISTRICT.

PER CURIAM.

This case was considered for hearing with the cases of Dose Harris in case No. 26624, having was also tried as above, together with twenty-one other cases, all taken appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. Not to have read in our decision in the case of Dose Harris, No. 26624, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

29613

46 - 29683

492a

FRANCINE BROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF OSCAR SIMON,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 644

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29678, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29678, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

49 25a

47 - 29684

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF SARAH SNYDER,
Appellant.

240 I.A. 644

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

47 - 30064

FRANKLIN FROZE COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF LEAVE GRANTED.

Appellant.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Martin in case No. 29673, having the same vital element, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Martin, No. 29673 , infra (7 ill. 2d), is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

SUPREME COURT.

COPY FROM

48 - 29685

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of MARION BROSTEK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 645

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

29686

49 - 29686

492 1a

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 645

ON APPEAL OF F. BRAVERMAN,
Appellant.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. That we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

PRINCIPAL LOCAL PROPERTY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF PUBLIC UTILITIES,
etc., et al.,
Defendants.

ON APPEAL FROM [illegible],
Appellant.

Case Dismissed.

This case was preliminarily now hearing with the appeal of Home Service in case No. 20870, making the same title as above, together with transcript, other papers, all being appeals from an order for injunction in similar a preliminary injunction issued by the above entitled court. Such as have risk in any opinion in the case of Home Service, No. 20871, which day filed, is applicable to every transcript to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

50 - 29687

492 la

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 645

ON APPEAL OF STANLEY SKLORS,
Appellant.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

FRANKLIN MINOX COMPANY,
a corporation, et al.,
Complainants and Appellees,

AERIAL ZONE
COMMERCE COURT.
NOW DOCKET.

v.

JOINT BOARD OF CHICAGO LINES,
etc., et al.,
Defendants.

ON APPEAL OF STANDARD ENGINE,
Appellant.

THE CHIEF JUSTICE:

This case was consolidated for hearing with the appeal of Dow Mar.le in case No. 2023, having the same title as above, together with twenty-two other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. Not so have said in our opinion in the case of Dow Marble, No. 2023, this day filed, is applicable to every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

51 - 29688

FRANCINE FROCK COMPANY,
a corporation et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF EMMA BROGSTRUM,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 645

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

D1 - 20623

PARADISE MINES COMPANY,
a corporation et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHIN OO INDIAN,
etc., et al.,
Respondents.

ON APPEAL OF CHAN HSCHLIEN,
Appellant.

ORDER.

This case has been submitted for by vtue with the appeal of Hsue Hsiln in case No. 20673, having the same title as above, together with twenty-one other cases, all being appeals from an order rendered in validation proceedings for injunction issued in the above entitled cause. Find we have said in our opinion in the case of Yuen Hsiln, No. 20673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

ALBERT MOON

CY MOON COUNTY.

TOOK COUNTY.

52 - 29689

493 Pr

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF VICTORIA CHISLAKIEWICZ,
Appellant.

240 I.A. 646

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. That we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

WRAMBLING STOCK COMPANY,
a corporation, et al.,
Contestants and Appellees,

v.

JOINT BOARD OF CONTROL LOSALE,
etc., et al.,
Defendants.

ON APPEAL FROM VIRGINIA DISTRICT,
Appellant.

MR. CHIEF JUDGE:

This case was argued together for hearing with the appeal of Rose Martin in case No. 29973, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. For as have said in our opinion in the case of Rose Martin, No. 29973, this day filed, is applicable in every respect in this, and for the reasons therein stated the judgment in this cause will be affirmed.

AFFIRMED.

53 - 29690

493 a

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

ON APPEAL OF BENJAMIN STEIN,
Appellant.

240 I.A. 646

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 26973, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

54 - 29691

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS OF
THE INTERNATIONAL LADIES' GARMENT
WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF ALBINA GAG,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 646

PER CURIAM.

By this appeal, consolidated for hearing with No. 29676, Albina Gag seeks to reverse an order of the Superior Court, entered May 29, 1924, adjudging her guilty of contempt of court for violating an injunction against picketing, assaulting, etc., issued on March 17, 1924, and committing her to jail for sixty (60) days, unless sooner discharged by law, and also imposing upon her a fine of $250, - she to be confined in jail, not exceeding four months, until the fine be paid, or until she be discharged according to law.

For the reasons stated in the opinion in case No. 29676, this day filed, the order of the Superior Court is affirmed.

AFFIRMED.

MAGNUSON ROCK CORPORATION,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS OF
THE INTERNATIONAL ALLIED CONCRETE
WORKERS' UNION, et al.,
Defendants.

ON APPEAL OF ALLEN CAO.
Appellant.

MR. JUSTICE [illegible]

By this appeal, [illegible] to review an order of the Superior Court, entered [illegible], dismissing his motion of contempt at [illegible] in enjoining [illegible] plastering, masonry, etc., [illegible] committing [illegible] discharged by law, and also [illegible] the time be said, or until [illegible]

No. 25876, [illegible] is affirmed.

[illegible]

55 - 29692

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of VALENTINE PIESECKI,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 646

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

4734

56 - 29693

FRANCINE FROCK COMPANY et al., Complainants and Appellees, vs. JOINT BOARD OF CHICAGO LOCALS, etc., et al., Defendants. On the Appeal of SARAH HOWVITZ, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 647

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

57 - 29694

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of CHARLES P. MUELLER,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 647

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

4926

58 - 29695

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF JOHN SWEIKOFSKI,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 647

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

FRANKLIN ROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO BLOCK,
etc., et al.,
Defendants.

ON APPEAL OF JOHN SHELDONAL,
Appellant.

APPEAL FROM
U. S. CIRCUIT COURT.
NORTHERN DISTRICT.

FILED OCT 1 1924

STATEMENT.

This case was consolidated for hearing with the appeal of Rose Hurtle in No. 32007, having the same title, above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. That so much of the opinion in the case of Rose Hurtle, No. 32007, filed herein, is applicable in every respect to this, it has been so noted under that judgment in this case will be affirmed.

AFFIRMED.

59 - 29696

4137

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF ROSE GOODMAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 647

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

39 - 39606

MARKLINE STOCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF [illegible] INDIANA,
etc., et al.,
Defendants.

ON APPEAL OF ROSE GOODMAN,
Appellant.

MEM ORANDUM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 39074, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. Not so now but in our opinion in the case of Rose Harris, No. 39074, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

60 - 29697

4/384

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of EMMA DEERING,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 648

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

61 - 29698

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF WILLIAM WENTWORTH,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 648

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

No. 1 -

DIVISION TWO.

[illegible]

PACIFIC 648

ON APPEAL OF [illegible] COMPANY,
Appellant.

FOR THE C.

This case was consolidated for hearing with the appeal of Rose Harris in case no. 8207, herein the same title is shown, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. But as have said in our opinion in the case of Rose Harris, No. 8207, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

[illegible]

62 - 29699

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF CLARA MILLER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 648

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

SAN DIEGO, 948

SHAMROCK STOCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO BROKERS,
etc., et al.,
Defendants.

ON APPEAL BY CLARA BRIANT,
Appellant.

FROM DECREE.

This case was a consolidation of a bill filed with the Board of Trade Rules in cause No. 3872, herein the 3 with a decree, together with transcripts other cases, and in the appellate court on order for contempt in violating a preliminary injunction issued in the above entitled cause. [illegible] as in our opinion in the case of Duce Farris, No. 3873, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

Affirmed.

63 - 29700

49410

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL OF SOPHIE YOUNG,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 648

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

MARKETS BROKE COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

ON APPEAL BY DEFENDANTS TRADE,
Appellant.

THE PARTIES.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 27673, Marion the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in that they a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 27673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

64 - 29701

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of ALBERT DUBIEL,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 649

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

64 - 29701

MANHATTAN BEACH DEBENTURE,
a corporation, et al.,
Complainants and Appellees,

v.

JOHN DOHRN CO. AND CO. LTD.,
etc., et al.,
Defendants.

On appeal of ALBERT BURNS,
Appellant.

Per Curiam:

This case was consolidated for hearing with the appeal of Rose Ricks in case No. 29702, using the same title as above, involving all exceptions other than, all being appeals from an order for contempt in violation a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Ricks, No. 29702, ante, by this date, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

Affirmed.

65 - 29702

4943a

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of MRS. L. REMAS,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 649

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

66 - 29703

4944a

240 I.A. 649

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

On appeal of MAURICE ULITZKY,
Appellant.

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

MANCHESTER ROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CRICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of MARION WILTSEY,
Appellant.

MR. JUSTICE.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 8891, bearing the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violation a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 8891, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

APPEAL FROM

INJUNCTION COURT,

COOK COUNTY.

67 - 29704

4945 A

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of MATHEW ARBABSKAS,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 649

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

67 - 82704

FRANKLIN FROZE COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On Appeal of NATHAN ABRAMSON,
Appellant.

PER CURIAM.

This case was considered for decision with the appeal of Hugo Harris in case No. 82672, having the same title as above, together with twenty-one others, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. As we have said in our opinion in the case of Hugo Harris, No. 82672, this day filed, in applicable in every respect to this, and for the reasons therein stated the judgment in this c[illegible] be affirmed.

AFFIRMED.

49460

68 - 29705

FRANCINE FROCK COMPANY et al., Complainants and Appellees, vs. JOINT BOARD OF CHICAGO LOCALS, etc., et al., Defendants. On the Appeal of LOUIS SOKOLOFF, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 650

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

84 - 87705

MARKLEY MOCK COMPANY, et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF STATE AUDITORS,
etc., et al.,
Defendants.

On the Appeal of JOINT BOARD,
Appellee.

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

69 - 29706

494

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of CELIA FACTOR,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 650

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

70 - 29707

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of MINNIE SUGARMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 650

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

71 - 29708

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of ALBERT D. FERGUSON,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 650

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

71 - 29708

FRANCHISE TRUCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of ALBERT G. WOODCOCK,
Impleaded.

ERN OPINION.

This case was consolidated for hearing with the appeal of Rose Morris in case No. 29074, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Morris, No. 29074, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

72 - 29709

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of CLARA ZAZKOW,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 651

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

73 - 29710

FRANCINE FROCK COMPANY,
a corporation, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal of EVELYN DOERNFELD,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 651

PER CURIAM.

This case was consolidated for hearing with the appeal of Rose Harris in case No. 29673, having the same title as above, together with twenty-one other cases, all being appeals from an order for contempt in violating a preliminary injunction issued in the above entitled cause. What we have said in our opinion in the case of Rose Harris, No. 29673, this day filed, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

4952

74 - 29711

FRANCINE FROCK COMPANY et al.,
Complainants and
Appellees,

vs.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On the Appeal of YATTIE RASSMAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 651

PER CURIAM.

This case was consolidated for hearing with the appeal of Margaret Welch, Gen. No. 29675, together with eleven other cases, all being appeals from an order entered in the above entitled cause for contempt in violating a preliminary injunction issued therein. What we have said in our opinion this day filed in the case of Margaret Welch, Gen. No. 29675, is applicable in every respect to this, and for the reasons therein stated the judgment in this case will be affirmed.

AFFIRMED.

[illegible] - 28711

[illegible]RANCHIZE SCHOOL COMPANY et al.,
Corporations and
Appellees,

vs.

[illegible]JOINT BOARD OF [illegible]
[illegible]ato., et al.,
Defendants.

[illegible] the Appeal of TAXPIE [illegible],
Appellant.

[illegible]

[illegible] This case was [illegible] the Supreme [illegible] appeal of Interpret action, [illegible], 28711, [illegible] where [illegible] other cases, all being [illegible] from [illegible] in the above entitled cause for [illegible] in [illegible] Information issued therein. [illegible] this day filed in the cause of Interpret [illegible], [illegible] the applicants in accordance to [illegible] stated the judgment in said cause will be [illegible].

[illegible]

79 - 29716

41532

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 651

On appeal in the matter of
JENNIE CHANIN,
Appellant.

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior Court is affirmed.

AFFIRMED.

80 - 29717

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ESTHER RICHMAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 652

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713) the order of the Superior court is affirmed.

AFFIRMED.

49550

81 - 29718

GRACKLINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MEYER KRANZ,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 652

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior Court is affirmed.

AFFIRMED.

81 - 29713

CHARTERING RIVER COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On Appeal in the matter of
MEYER KAHN,
Appellant.

THE CHIEF JUSTICE.

This is an appeal from an order of the chancery court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Hilton, with which it was consolidated and heard in this court upon the same records, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Docket No. 29713), the order of the superior court is affirmed.

A-27 Ill.

82 - 29719

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
CAROLINE WEGLOSKI,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 652

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

495 pa

83 - 29720

GRACE LINE DRESS COMPANY et al.,
Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
THERESA ARODS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 652

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713, the order of the Superior court is affirmed.

AFFIRMED.

83 - 30750

GRACE LINE STEAM SHIPS COMPANY et al.,
Appellants,

v.

JOHN DOYLE et al.,
Respondents.

On appeal in the matter of
THERESA HOLM,
Appellant.

Decided [illegible]

This is an appeal from an order of the Appellate Division reversing a judgment on a verdict. The case was tried before a referee of that court. The claim was for [illegible] injuries, with which it was contributed [illegible] the same vessel, [illegible] of [illegible]. The [illegible] both cases, and for the reasons [illegible] in that case (Sup. No. [illegible]), the order of the Appellate Division is affirmed.

[illegible]

84 - 29721

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
Rose Vinesilver,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 653

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

84 - 52721

GRANDELIER DRUGS CORPORATION et al.,
Complainants and Appellees,

v.

JOINT BOARD OF MILKING LOCALS,
etc., et al.,
Defendants.

On Appeal in the matter of
Hans Zimmelivar,
Appellant.

PER CURIAM.

This is an appeal from an order of the District Court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Hans Zimmer, with which it was consolidated and heard in this court upon the same record, briefs and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Docs. No. 52713), the order of the district court is affirmed.

AFFIRMED.

85 - 29722

49 39 a

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
JULIA BROZA,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 653

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

ORACLINE MINES COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL OF MINES
etc., et al.,
Defendants.

On appeal in the matter of
JULIA MOORE,
Appellant.

ENDORSEMENT.

This is an appeal from an order of the Superior Court imposing a punishment on the petitioner for violating an injunction of that court. The case was tried with most of the facts with which it has to deal in this court upon the same record, stipulated by counsel. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Cons. No. 20723), the order of the Superior Court is affirmed.

(XXX 2d).

49600

86 - 29723

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
BESSIE GITMAN, alias Bessie Gilman,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 653

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

[illegible] - 8076

[illegible] DRAINAGE DISTRICT CONTRACT et al.,
Complainants and Appellees,

v.

[illegible] DRAIN BOARD OF CHICAGO LEVEE,
[illegible], et al.,
Defendants.

[illegible]
[illegible] appeal in the matter of
[illegible] CENTRAL, Alias Bessie Williams,
Appellant.

[illegible] OPINION.

This is an appeal from an order of the superior court [illegible] a judgment on [illegible] for defendant in injunction [illegible] that court. The case was tried [illegible] of [illegible] River, [illegible] which it was commenced and heard in that court upon the [illegible] record, abstracts and briefs. The facts are [illegible] in [illegible] cases, and for the reasons stated in the opinion [illegible] in [illegible] case (Gen. No. 20713), the order of the superior court [illegible] affirmed.

[illegible]

87 - 29724

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
YETTA HORNSTEIN,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 653

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

88 - 29725

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

On appeal in the matter of
WANDA KOLETTA,
Appellant.

240 I.A. 654

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

No. - 20720

PROCEEDINGS BEING DEBATED - et al.,
Complainants and Appellees,

v.

JOINT BOARD OF TEACHER LICENSE,
etc., et al.,
Defendants.

On appeal by the writer of
GEORGE MOLITA,
Complainant.

PER CURIAM.

This is an appeal from an order of the Superior Court imposing a punishment on complainant for a libelous in,junction of that court. The case was tried by Judge Rose Silver, with which it was satisfied and by an in this court upon the same record, briefs and briefs. The facts are the same as set forth on pp. 1-2 of the opinion filed in this case in 1. Cont'd. The order of the Superior Court is affirmed.

AFFIRMED.

89 - 29726

GRACKLINE DRESS COMPANY et al.,
Complainants and Appellees,

vs

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

240 I.A. 654

On appeal in the matter of
ROSE PRINTZ,
Appellant.

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

[illegible] - 2076

[illegible] PEARL COMPANY et al.,
Complainants and appellees,

vs

[illegible] JOINT BOARD OF [illegible] LOCALS,
[illegible] et al.,
Defendants.

[illegible] appeal in the matter of
[illegible] SMITH,
Appellant.

[illegible] FOR PRIMA [illegible]

This is an appeal from a decree of the superior court imposing a punishment [illegible] for [illegible] a injunction [illegible] of that court. The [illegible] of [illegible] Smith, [illegible] which it was convicted [illegible] the [illegible] upon the [illegible] record, discovered and [illegible]. [illegible] both cases, on [illegible] the reasons stated in the opinion filed in that case (Sup. Ct. 2071), the [illegible] order is affirmed.

[illegible]

90 E- 29727

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
JENNIE MILLER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 654

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

No. 4- 20727

BRADENHIRE BRICK COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL LOCALS
etc., et al.,
Defendants.

On appeal in the matter of
IRONIE MILLS,
Bankrupt.

FOR OPINION.

Pale is an appeal from a decree in the Superior Court imposing a punishment in the nature of a fine for civil contempt of that court. The [illegible] in which it was committed [illegible] upon the same record, [illegible] facts. The [illegible] in both cases, and for the reasons [illegible] in that case (Docs. No. 20713), the order of the Superior Court is affirmed.

[illegible]

91 - 29728

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Respondents.

On appeal in the matter of
JOHN GOTTLIEB,
Appellant.

240 I.A. 654

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

[illegible]MACDONALDS MINES COMPANY et al.,
Complainants and Appellees,

v.

[illegible]TOINT BOARD OF [illegible] LOWING,
[illegible]ts., et al.,
Respondents.

[illegible]on appeal in the matter of
[illegible]TON COUNTIES,
Appellant.

[illegible] 1.M. [illegible]

[illegible] This is an appeal from a order of the superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with [illegible] of fact overwhelming, [illegible]ch which it was conclusively and been in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Sup. No. 8271), the order of the superior court is affirmed.

CONTEMPT.

4766

92 - 29729

240 I.A. 654

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc. et al.,
Defendants.

On appeal in the matter of
ISADORE DIXLER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior Court is affirmed.

AFFIRMED.

92 - 29729

GASOLINE DRESS COMPANY et al.,
Complainants and appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc. et al.,
Defendants,

On appeal in the matter of
ISADORE DIXLEN,
appellant.

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 27723), the order of the Superior Court is affirmed.

AFFIRMED.

93 - 29730

4167a

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
DAVID KRAUSS,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 655

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

GRANDLIEU PRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF OHIO CO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
DAVID KRUSE,
Appellant.

PER CURIAM.

This is an appeal from an order of the superior court imposing a punishment on appellant for violation an injunction of that court. The case was tried with that of Mary Garrelts, with which it was argued and upon hearing in this court upon the same record, attorneys and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the superior court is affirmed.

AFFIRMED.

94 - 29731

496 Cu

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
BERTHA PLANTE NOEL,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 655

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

94 - 20721

CHARLTON JAMES C. MILLER et al.,
Complainants and appellees,

v.

JOINT BOARD OF CHICAGO LOCAL
etc., et al.,
Defendants.

Appeal in the matter of
SANITARY PLANTS WORK,
Appellant.

PER CURIAM.

This is an appeal from an order of the municipal court dismissing a petition on appeal for writ of mandamus of that court. The case was tried with that of Mr. Miller, with which it was consolidated, and heard in the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Docket No. 20721), the order of the superior court is affirmed.

AFFIRMED.

496 Ia

95 A- 29732

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MARY SINGER,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 655

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

No. 20732

CHACHALIKE BRAND COMPANY et al.,
Complainants and Appellees,

v.

DEBIT BOARD OF CHICAGO [illegible],
etc., et al.,
Defendants.

On appeal in the matter of
MARY BIRGE,
Bankrupt.

MR. JUSTICE [illegible].

This is an appeal from an order of the District court imposing a punishment as criminal for violation a injunction of that court. The case was tried [illegible] of fact. [illegible] which it was convicted [illegible] in this court upon the same record, [illegible] brief. [illegible] on the [illegible] both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 20713), the order [illegible] be affirmed.

MR. [illegible].

96 - 29733

4702

GRACKLINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS, etc., et al.,
Defendants.

On appeal in the matter of
SARAH SIDEL,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 655

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

No. 20121.

ORAGENIUS MARIO DOM. ET AL.,
Complainants and Appellees,

v.

JOINT BOARD OF CRIMAGO MOCALE, etc.,
et al.,
Defendants.

On appeal in the matter of
MARAM SIDNI,
Appellant.

MR. JUSTICE.

This is an appeal from an order of the Superior Court imposing a punishment on petitioner for violating an injunction of that court. The order was issued in the course of proceedings with which it was connected and based in like manner on the same records, briefs and briefs. The [illegible] in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 20121), the order of the Superior Court is affirmed.

Affirmed.

49 11

97 - 29734

GRACELINE DRESS COMPANY et al., Complainants and Appellees, v. JOINT BOARD OF CHICAGO LOCALS, etc., et al., Defendants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
On appeal in the matter of IDA DURNOW, Appellant.	240 I.A. 656

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

97 - 20934

GRADUATING DEGREE COMPANY, et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL IN THE
case, et al.,
Defendants.

On appeal in the matter of
LIA BURNOUGH,
Appellant.

[illegible]

This is an appeal [illegible] a preliminary injunction [illegible] of that court. The case was argued with [illegible] with which it was consolidated, and before [illegible] same record, abstracts [illegible]. The facts [illegible] both cases, and for [illegible] in the opinion filed in that case (Cer. No. 20713), the order of [illegible] is affirmed.

[illegible]

98 - 29735

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
EVA JACOBS,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 656

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

No. 2076D

GRAGHLINE MINING COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
JYA JACOBS,
Appellant.

BY CURIAM.

Syllabus. This is an appeal from an order of the Superior Court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Oliver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Docs. No. 20713), the order of the Superior Court is affirmed.

AFFIRMED.

NATIONAL UNION

SUPERIOR COURT.

COOK COUNTY.

99 - 29736

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ANNA BERENBAUM,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 656

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

No. 20756

CHARLESTON LUMBER COMPANY et al.,
Complainants and appellees,

v.

JOHN MOORE OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ANNA REISENBAUM,
Appellant.

FOR OPINION

This is an appeal from an order of the chancery court impanelling a guardian ad litem to defend on behalf of an infant defendant in a suit. The case was tried with that of Rose Oliver, with which it was consolidated, and in the trial court upon the same record, stipulations and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Sup. No. 20718), the order of the chancery court is affirmed.

AFFIRMED.

100 - 29737

49 142

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ROSE CHOFRIO,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 656

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior Court is affirmed.

AFFIRMED.

[illegible] - 2970

[illegible]

[illegible]MACDONALDS IN THE COURT OF [illegible] et al.,
[illegible] Complainants and Appellees,

v.

[illegible]OINT BOARD OF ONTARIO [illegible]
[illegible]te., et al.,
[illegible] Defendants.

[illegible]n appeal in the matter of
[illegible]DGE ONTARIO.
[illegible] Appellant.

FOR ONTARIO.

This is an appeal from an order of the Appellate Court [illegible] imposing a punishment on appellant for wilful disobedience [illegible] of that court. The case was tried with that of Rose [illegible] [illegible]ritt which it was conceded had and is to be taken upon the [illegible] record, statutes and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 2973), the order of the Appellate Court is affirmed.

AFFIRMED.

49 Pa

101 - 29738

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ROSE STONE,
Appellant.

APPEAL FROM

SUPERIOR COURT.

COOK COUNTY.

240 I.A. 657

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Turewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

103 - REVSD

GRACONLIVE MINING COMPANY et al.,
Complainants and appellees,

v.

JOINT BOARD OF OHIO DO INDIAN,
etc., et al.,
Defendants.

On appeal in the matter of
MINING MORATOR.

Appellant.

FOR OPINION.

This is an appeal from a order of the superior court imposing a punishment on a defendant for violating an injunction of that court. The case was tried with that of Gary Corporation, with which it was consolidated. It heard in that court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons set out in the opinion filed in that case (Gen. No. 9712), the order of the superior court is affirmed.

AFFIRMED.

497 1a

103 - 29740

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
FANNIE ROZEN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 657

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

103 - 20740

BRACKLINE BRICK COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF ZONING BOARDS,
etc., et al.,
Respondents.

On appeal in the matter of
YAMIN ROZEN,
Appellant.

PER CURIAM.

This is an appeal from an order of the superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 9123), the order of the superior court is affirmed.

AFFIRMED.

49 Ill a

104 - 29741

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
ANNA FELDMAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 657

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

104 - 39141

GRANDLIEU MEDICAL DEPOT, [illegible]
Complainants and Appellees,

v.

JOINT BOARD OF CONTROL [illegible]
etc., et al.,
Respondents.

On appeal in the matter of
ANNA MELONAS,
Appellant.

N. E. Wolfe.

This is an appeal from an order of the chancery court imposing a punishment on appellant for violating an injunction of that court. The case is filed with the [illegible] of a long controversy, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 39141), the order of the chancery court is affirmed.

Affirmed.

105 - 29742

497 9a

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
BESSIE FISHMAN,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 657

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

No. - 20762

BRACKLINE MAKER COMPANY et al.,
Complainants and Appellants,

v.

JOINT BOARD OF SANITARY LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MARGIE TERRAN,
Appellant.

PER CURIAM.

This is an appeal from an order of the superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of many defendants, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in our opinion filed in that case (Gen. No. 29712), the order of the superior court is affirmed.

AFFIRMED.

106 - 29743

49866

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
LILLIAN GRENNBERG,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 658

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Rose Silver, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29713), the order of the Superior court is affirmed.

AFFIRMED.

108 - 37743

GRANGELINE PAVING COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
LITTLAN SUMMERVAND,
a bankrupt.

PER CURIAM.

This is an appeal from an order of the superior court imposing a punishment on appellant for violating an injunction of that court. The order was tried with in r of Deep River, with which it was consolidated and, as in this court upon the same record, abstracts on briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Docs. No. 37743), the order of the superior court is affirmed.

Affirmed.

49 1a

L07 - 29744

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

On appeal in the matter of
EUGENIA SZLACHTA,
Appellant.

240 I.A. 658

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior Court is affirmed.

AFFIRMED.

No. 20724.

GRAGGLINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MUSKEGO BALLADYE,
Appellant.

APPEAL FROM

MUSKEGON COUNTY.

LOCK COUNTY.

MR. CHIEF JUSTICE.

This is an appeal from an order of the superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with the of Mary Gravette, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 20713), the order of the superior court is affirmed.

AFFIRMED.

4 182a

108 - 29745

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MINNIE SEIDEL,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 658

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

108 - 8Vis

CHAUNCEY, EMILE COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF SANITARY ACTION,
etc., et al.,
Defendants.

On appeal in the matter of
MINNIE SMITH,
Appellee.

FOR COURT.

This is an appeal from a decree of the Superior Court imposing a punishment on appellant for violating an injunction of that court. The case was tried with [illegible] on [illegible], with which it was consolidated and heard in this [illegible] same record, abstracts and brief. The facts in the [illegible] are in both cases, and for the reasons stated in the opinion [illegible] case (Gen. No. 8271), the order of the superior court is affirmed.

[illegible]

109 - 29746

49 83 a

GRACELINE DRESS COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF CHICAGO LOCALS,
etc., et al.,
Defendants.

On appeal in the matter of
MORRIS KRAVIS,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 658

PER CURIAM.

This is an appeal from an order of the Superior court imposing a punishment on appellant for violating an injunction of that court. The case was tried with that of Mary Gurewitz, with which it was consolidated and heard in this court upon the same record, abstracts and briefs. The facts are the same in both cases, and for the reasons stated in the opinion filed in that case (Gen. No. 29712), the order of the Superior court is affirmed.

AFFIRMED.

109 - 29746

CHARGULIES BROS. COMPANY et al.,
Complainants and Appellees,

v.

JOINT BOARD OF TEAMSTERS AND CHAUFFEURS,
etc., et al.,
Defendants.

On appeal in the matter of
SONNIE KRAVIT,
Applicant.

PER CURIAM.

This is an appeal from an order of the superior court impaneling a grand jury in anticipation of the indictment of this court. [illegible] Henry Burovitz, with which it was [illegible] In this court upon the same [illegible] are the same in both cases, and for the reasons [illegible] opinion filed in that case (Ibid., [illegible]) the superior court is affirmed.

PER CURIAM.

230 - 30083

EDITH ISAACSON,
Appellee,

v.

CITY OF CHICAGO,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

240 I.A. 659

Opinion Filed January 20, 1926.

MR. JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, City of Chicago, seeks to reverse a judgment for $1200 recovered against it by the plaintiff, in the Circuit Court of Cook County, in an action which the plaintiff brought seeking to recover damages claimed to have been suffered by her as a result of injuries received when she fell through an iron trap door, located in a sidewalk in the City of Chicago.

Following the accident which the plaintiff experienced, she caused a notice to be served on the City. This notice was signed by her and in it she stated that on September 22, 1921, about ten o'clock in the evening, "the undersigned was injured by the falling of a trap door or areaway entrance in and upon the sidewalk on West Roosevelt Road in the City of Chicago, to-wit, at or near street number 3311 West Roosevelt Road, Chicago, Illinois. * * * You will further notice that the undersigned resides at 3726 Cottage Grove avenue, Chicago, Illinois, and that her physicians and surgeons are Dr. Samuel Sinkler, 3424 W.

Opinion filed January 30, 1936.

Roosevelt Road, and Dr. L. E. Halperin, 1301 N. Western avenue." This notice was dated October 11, 1921.

In support of its appeal the defendant contends that the notice was insufficient in that it failed to give the name of the person to whom the cause of action had accrued as the statute requires. We have had occasion a number of times to hold that such an objection as this is wholly untenable. The purport of the notice is plainly to the effect that a cause of action is claimed by the one signing the notice, who, according to the notice, is the person who was injured. It is also claimed that the notice was defective in that it gives the residence of the plaintiff as 3726 Cottage Grove avenue, whereas it is said the proof shows that she lived at 3724; and also that it gave the address of Dr. Halperin as 1301 N. Western avenue, whereas the proof shows that his correct address was 1300 N. Western avenue, and it is contended in this connection also, that there is a fatal variance between the declaration and the proof, as the declaration contains a copy of the notice, and thus has incorporated in it these allegations as to the address of the plaintiff and that of Dr. Halperin, which are at variance with the proof. In our opinion, the discrepancies noted are not such as to make the notice so defective as to defeat the plaintiff's action. 3424 and 3426 are adjoining numbers. As the plaintiff mentioned one in her notice and the other in her testimony, it may well be that both applied to a single entrance. As to the address of the doctor, while the plaintiff testified the doctor's office was at 1300 North Western avenue at the time she received

her injuries, which was three years prior to the time of the trial, the doctor was merely asked what his office address was at the time he was testifying and he gave it as 1301 North Western avenue.

Defendant also contends that the damages awarded the plaintiff, amounting to $1200, were grossly excessive, as her injuries were trivial and the proof shows that she was absent from her employment only 5 or 6 days. On this question the proof shows that while the plaintiff was walking along the sidewalk with two other young women, they had occasion to walk across an iron trap door, which constituted a part of the sidewalk. This door was made up of two leaves, one slightly overlapping the other. As the plaintiff and her companions stepped upon one of these leaves, the ledge upon which it rested gave way and dropped them to the floor of the basement under the sidewalk, 8 or 9 feet below. As the plaintiff fell through the areaway her head struck one of the iron doors and she was dazed. She testified that she experienced "severe pains in my head and I was bruised quite a bit;" that she was absent from her employment 5 or 6 days and that on the day following the accident she was first treated by Dr. Halperin and that he continued to see her every day for about two weeks and that throughout the period of three years, between the time of the accident and the time of the trial she had seen this doctor at least every two weeks, the last visit having occurred on the Friday preceding the giving of her testimony. She testified that she continued to experience severe pains in her head; that "at times it seems as though something is

hammering in my head all the time, especially when it rains; when the weather changes I am forced to lie in bed for 3 or 4 hours a day." She testified that she never had any trouble of this kind prior to her injury, and that since the accident she had experienced difficulty in keeping her mind on anything and also that she lost about four hours of sleep every night.

Dr. Halperin testified that he first treated the plaintiff the day following her injury and that from an examination he made of her at that time he found that "she was suffering from numerous bruises and contusions about the arms, body and legs; and had a hematoma on the head. A hematoma is a blood tumor." He testified that this swelling on the plaintiff's head was raised about three quarters of an inch; that the plaintiff complained of severe headaches, dizziness and a general feeling of weakness; that he saw her daily for two or three weeks and after that she came to his office "once every two, three or four weeks," and that her last visit to his office was about two or three weeks prior to the time of the trial. He was asked as to her present condition, and he testified that "her reflexes were somewhat exaggerated" when he made his last examination, which meant that her nervous system was irritated. He testified that a reasonable charge for all the services he had rendered was $250.00. The plaintiff's sister testified that at the time of the plaintiff's injury her head was bruised and also her arm and foot.

becoming in my head all one time, naturally was in pain; when she neither answer [illegible] as I saw it in bed for 8 or 9 months day." The considers that the never has any trouble of this [illegible] to her injury, and that since the accident she has [illegible] lately in keeping her mind in [illegible] the [illegible] that hours of sleep every night.

Dr. Shipperth considered that he first treated the plaintiff the day following her injury and that from an examination he made of her at that time he found that "she was suffering from numerous bruises and contusions about the head, body and legs; she had a bruiseness on the head. A bruiseness is a blood tumor." He testified that this swelling on the plaintiff's head was which is among those portions of an body; then the plaintiff complained of severe headaches, dizziness and a general feeling of weakness; that he saw her daily for two or three weeks and after that she came to his office "some - very few, six or four weeks," and that her last visit was in April or May about two or three years prior to the trial. He was asked as to her present condition, and he testified that "her feelings are somewhat exaggerated" and he gave his last examination a. [illegible] bruises and lacerations. He thought [illegible] all the services he had rendered was [illegible]. The claim filed by plaintiff stated that as the result of the plaintiff's injury her head was bruised, [illegible] and [illegible].

When the plaintiff and her companions fell through the trap door in question, they were carried upstairs into the store, into the basement of which they had fallen, and someone called a doctor whose office was located nearby. This doctor testified that he examined the plaintiff at that time and found "a contusion and an edema in the temple perietal region," and that was all. He further testified that the extent of the edema referred to was "just a little swelling." This doctor also saw the plaintiff after she was taken to the home of her sister several hours later, and again the following day. He testified that he found nothing further in the way of injuries on either of those occasions; that he found nothing which in his opinion would lead to any permanent injury, and that on the following day the plaintiff wanted to go to work but he advised her to stay at home a few days.

On that evidence we are of the opinion that this court is not in a position to say that the damages awarded the plaintiff were excessive. The plaintiff was 20 years of age at the time of the trial of this case, which would make her 17 at the time of her injury. While the doctor who examined her on the night she experienced her fall and on the following day observed nothing but some apparently superficial bruises, the evidence shows that her own doctor found that the effect on her nervous system of those bruises and the fall, was such as to call for a continuance of his treatment of her throughout the period between the time of the accident and the time of the trial, which was three years.

When the plaintiff had her opinions on fall through the swing door in question, they were carried upstairs into the store, into the basement of which they had fallen, and someone called a doctor whose office was located nearby. This doctor testified that he examined the plaintiff at that time and found "a contusion and an edema in the sacrum particularly region," and that was all. He further testified that the extent of the edema indicated to him "just a little swelling." This doctor also saw the plaintiff after she came to the home of her sister several hours later, and in the following day. He testified that he found nothing further in the way of injuries on either occasions; that he found nothing which in his opinion was related to any permanent injury, and that on the following day the plaintiff wanted to go to work but he dissuaded her to stay at home a few days.

On that evidence we are of the opinion that this court is not in a position to say that the damages awarded the plaintiff were excessive. The plaintiff was a young girl of age at the time of the trial of the case, and had made her 17 at the time of her injury. Even the doctor who examined her on the day of the occurrence saw fit and on the following day observed nothing but some slightly superficial bruises, the evidence [illegible] and the fall, was such as to call for [illegible] treatment of her throughout the period [illegible] the time of the accident and the time of the trial, which was three years.

He was asked whether this nervous condition was permanent and he answered that he could not answer that question, yes or no. The plaintiff testified that even as late as the time of the trial, she continued to experience pains in her head and periods of dizziness as well as loss of sleep. On such evidence we do not feel we would be justified in disturbing the judgment because of the amount of the damages awarded.

The defendant makes the further contention that the verdict of the jury and the judgment appealed from, are against the manifest weight of the evidence, in that the proof shows that the City never had any direct notice of any defect in this trap door, and further, that the condition of the door and the sidewalk at this point, at and prior to the time of the plaintiff's injury, had not been such as to indicate that it was dangerous, and that, therefore, the City could not be charged with constructive notice of the condition which caused the door to give way.

On that point the plaintiff testified that as she walked along the sidewalk she did not see anything that would indicate that the door was out of order. One Horberg, who was the proprietor of the store, in connection with which this trap door was maintained in the sidewalk, testified that they never had occasion to use this door, which was an entrance to the basement of the store he occupied. He testified that every time one left his store and turned to the east, they would have occasion to walk over this trap door, and that he had occasion to do this several times a day. He was asked if the door appeared to him to be in good condition, and he

He was asked whether this person, [illegible] and he answered that he could not remember that [illegible], yes or no. The identity testimony was also [illegible] time of the travel, was contradicted by several witnesses in both head and periods of disturbance [illegible] such evidence we do not feel we could [illegible] thus upholding the judgment below of the [illegible] awarded.

The defendant asks the [illegible] the verdict of the jury and the [illegible] against the verdict [illegible] proof shows that the only water has any direct [illegible] may defect in this item [illegible] dition of the door [illegible] point, as and prior to the time of the [illegible] injury, not be a ground as to indicate the fact in was defective, and therefore, the only one [illegible] of the condition which caused the [illegible] of the conditions which caused the [illegible].

On that point the [illegible] walked along the sidewalk [illegible] indicate that the door was [illegible] was the janitor of the [illegible] trap door was maintained in [illegible] never had occasion to use this door, [illegible] the basement of the store [illegible] every time one left his [illegible] would have occasion to walk over this [illegible] had occasion to do this several times a day. [illegible] if the door appeared to be in good condition, [illegible]

answered that he "didn't think it was in perfect condition." He was asked to be more particular and he testified "it was not very level; it was sunken in, in the center to a certain extent; a little bit, * * * about an inch or so,- it looked that way." He was asked if the ends of the doors met evenly and he answered that they did not, "one was a little bit higher, that is where the sunken part was in." He said the door had been in this condition about two months. This witness testified that after the accident to the plaintiff, he examined the ledge upon which the trap door rested and it "was all rotted away." He testified that he had never reported the condition to any department of the City of Chicago.

One Rosen, who lived across the street from the point at which the door in question was located and who ran over and helped get the plaintiff and her companions up into the store after the accident, testified that he had lived in that neighborhood for 15 years and had passed the place where the store was located a great number of times. He said that he had never stepped on the door as he passed, "it had a sagging appearance to it, sagged on one side * * * about an inch or so." He said the door had been in this condition two or three months at the time the plaintiff was hurt.

For the defendant, a Mrs. Horwitz testified that she lived within a door of the point at which the plaintiff was hurt, for some 5 or 6 years and was acquainted with the conditions there at the time in question, and that she walked by this place many times during the day and walked over this

answered that he "didn't think it was in perfect condition."
He was asked to [illegible] particular [illegible] in question. It
was not very lively. It was [illegible] in the [illegible]
certain extent; a little but, [illegible] or
so.- It looked that way." He was asked if the [illegible]
the door not easily [illegible]
"one was a little bit [illegible]
part was in." He said the door had been in this condition
about two months. In answer to [illegible] that the
accident to the plaintiff, he answered the same [illegible]
the trap door rested and it was all rotted away. He
testified that he had never examined the condition to any
department of the City of [illegible].

One Brown, who lived across the street from the
point at which the alleged accident was located and who was
over and helped get her inside, [illegible] the
the stairs after the accident, [illegible]
in that neighborhood for 12 years and [illegible]
where the store was located a part of that time. He
said that he had never stepped on the door [illegible]
"it had a rattling as if there was [illegible]
right on top of it." He said the [illegible]
dition two or three weeks [illegible] the plaintiff [illegible].

[illegible] lived at a place of [illegible]
but, for some 8 or 9 years and was [illegible]
dition there at the time in question. [illegible]
by this [illegible] many times during the [illegible]

door. In describing the door she testified that there were two half doors "made down with the sidewalk even, just like a book when you open, just like the sidewalk even. * * * it was level -- mostly level -- a quarter of an inch higher. * * * but it was always even, so much as I know."

On the foregoing evidence, referring to the condition of the sidewalk surrounding the trap door through which the plaintiff fell, we are of the opinion that the question of whether the conditions were such as tocharge the defendant with constructive notice, so as to make it liable to one who was injured, was a question which the trial court properly left to the jury and this court cannot say their finding on that question is against the manifest weight of the evidence. The primary use of a public sidewalk is for the passage of pedestrians to and fro along the highway. An abutting property owner may not cut a hole through the sidewalk, and thus afford access to the basement of his premises and protect such opening by means of iron doors or other similar covering, without the express permission of the City. That situations of this kind involve elements of danger that are not present where they are not permitted to exist, is apparent. When the City chooses to permit some owner to create such a condition, the City must be charged with notice of the fact that the dangers, incident to the condition, are there, and the City will be required to exercise reasonable diligence so as to avoid injury to anyone making a proper use of the sidewalk as a highway. We are further of the opinion that a condition which may not be such as to amount to a constructive notice to the City if it

door. In describing the door as an inwardly [illegible] two half doors [illegible] a window [illegible], but that [illegible] book [illegible], [illegible] half door [illegible] level — nearly level — [illegible] but it was always open, [illegible] know."

In the language which [illegible], referring to the condition of the street, [illegible] the door [illegible] which the [illegible] half, [illegible] of the opinion that the question of whether the [illegible] the [illegible] the defendant with contributory [illegible], so as to make it liable to one who was injured, [illegible] the [illegible] trial court [illegible] to the jury [illegible] that [illegible] cannot say their finding on that question is [illegible] the preponderant weight of the evidence. [illegible] a [illegible] rule is for the [illegible] of pedestrians [illegible] along the highway. In [illegible] property [illegible] not a [illegible] through the alleyway, [illegible] to the [illegible] of his premises [illegible] door or other [illegible], without the [illegible] of the [illegible]. That [illegible] [illegible] of danger that are not present [illegible] by [illegible] to exist, in [illegible]. [illegible] owner to [illegible] a [illegible], [illegible] with notice of the fact that the [illegible], [illegible] to the condition, are there, [illegible] exercise reasonable diligence [illegible] would [illegible] making a proper use of [illegible] further of the point [illegible] as to amount to a [illegible] at

attached to the sidewalk itself, by reason of the fact that it was not open to casual observation but latent or hidden, may nevertheless have the opposite effect and be sufficient to charge the municipality with constructive notice where it has to do, not with the sidewalk itself, but with such an opening as is involved here, which the City has permitted a property owner to create and maintain in the public highway. As far as the sidewalk itself is concerned, most defects which give rise to a dangerous condition are open and apparent, but in the case of an opening through the sidewalk, with trap doors covering it, dangerous conditions may easily arise which create a higher degree of danger than the others just referred to but which are not open to casual observation and may only be found upon some inspection of the opening and the doors and the condition of the sidewalk immediately surrounding them. But the evidence in the case at bar was sufficient to warrant the jury in believing that more than this was present here, for one of the witnesses testified that one of the leaves of this trap door had "a sagging appearance," and there is at least an intimation on the part of one of the other witnesses that when he passed by at this point he avoided crossing the door for that reason. The question of whether the condition of this door, under all this evidence, had been for a reasonable period prior to the plaintiff's injury, such as to charge the City with constructive notice of the condition of weakness which permitted the plaintiff to fall through the door and be hurt, was one for the jury, as

attached to the sidewalk itself, by reason of the fact that it was not open to normal observation but latent or hidden, may nevertheless have the legal effect and be sufficient to charge the municipality with constructive notice when it was to do, not with the sidewalk itself, but with some condition or defect involved here, which the City has permitted a property owner to create and maintain in the public highway. As far as the sidewalk itself is concerned, cut defects which give rise to a dangerous condition are open and apparent, but in the case of an opening through the sidewalk, with trap doors covering it, dangerous conditions may easily arise which create a higher degree of danger than the others just referred to but which are not open to normal observation and can only be found upon some inspection of the opening and the doors and the condition of the sidewalk immediately surrounding them. But the evidence in the case at bar has an tendency to warrant the jury in believing that doors have been seen present here, for one of the witnesses testified that one of the leaves of this trap door was "in plain appearance," and there is a total no notification on the part of one of the other witnesses that it was caused by at this point be avoided crossing the door in the ordinary course. The question of whether the condition of the door, under all this evidence, had been for a reasonable period prior to the plaintiff's injury, such as to charge the City with constructive notice of its condition of soundness which contributes to plaintiff's fall through the door and be hurt, was one for the jury, as

we have already stated, and, in our opinion, there is sufficient evidence to support their finding.

For the reasons stated, the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

255 - 30108

ELMER BROWN,

Appellee,

v.

MILTON H. CALLNER, doing business as REALTY BUILDING & CONSTRUCTION COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

Opinion filed Jan.20,1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment obtained against him by the plaintiff in the Municipal Court of Chicago. The plaintiff's claim was for work done and material furnished in decorating a building owned by the defendant and located at 928 Winona avenue, in the City of Chicago.

It appears that the defendant was the owner of a number of buildings, andamong them was the one involved in this case. At the time the case at bar was instituted by the plaintiff, he had completed three different jobs for the defendant on three different buildings, including the one in question. The plaintiff brought an action against the defendant, for the work done on one of these buildings, on October 7, 1924, returnable October 21, and in that case he recovered a judgment against the defendant for $100 and costs on October 31. The plaintiff began the case at bar on October 14, 1924, returnable October 22, and judgment was entered in favor of the plaintiff on November 24. In finding for the

Opinion filed Jan.30,1933.

plaintiff the trial court specifically found that the plaintiff had done, "separate and distinct work on separate and distinct buildings at separate and distinct stipulated prices on each building," and the court held that where he had brought his action on the building involved here, for a stipulated amount under a stipulated contract, it was not necessary for him to consolidate his claim with others he might have for work done and material furnished on other buildings owned by the defendant.

The only contention made by the defendant in support of his appeal is that the plaintiff had in substance but one claim against him, and such being the case, it was incumbent upon him, if he chose to institute an action against him, to sue for the entire amount he contended was due on such claim; and inasmuch as he had seen fit to bring a prior action for only a part of that claim, namely $123.00 claimed to be due on another building, in which prior action he had recovered a judgment for $100, the trial court should have found for the defendant and entered judgment accordingly, holding that the plaintiff was precluded from any further recovery on his claim, by the judgment previously recovered by him.

In support of his contention, the defendant has called our attention to a number of cases, but we shall not refer to all of them. Lucas v. LeCompte, 42 Ill. 303; Rosenmueller v. Lampe, 89 Ill. 312; and Nickerson v. Rockwell, 90 Ill. 460, are typical. The Lucas case involved a statute providing that in all suits commenced before a justice of the

plaintiff the trial court [illegible] the plaintiff had done, "concrete and distinct work on separate and distinct buildings at separate [illegible] prices on each building," and [illegible] they [illegible] had brought his action on the building [illegible] for a stipulated account rather [illegible] court at, it was not necessary for him to consolidate his claim with others he might have for work done and material furnished on other buildings owned by the defendant. [illegible] 2d.

The only conclusion made by the court [illegible] in support of its ruling is that the plaintiff can be [illegible] but one claim against him, for such being the case, it was incumbent upon him, if he [illegible] to institute an action against him, to use for the entire amount in controversy [illegible] due on such claim and [illegible] as he has seen fit to bring a prior action for only a part of that claim, namely that claimed to be due on another building, in [illegible] prior action he had recovered a judgment for [illegible] trial court who [illegible] have found for the defendant and [illegible] "consistently" holding that the plaintiff was [illegible] from any further recovery on his claim, by the judgment [illegible] by him.

In support of his contention, the defendant has called our attention to a number of cases, but we shall not refer to all of them. [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. 450, are typical. The [illegible] contains a statute providing that in all suits commenced [illegible]

peace, "each party shall bring forward all his or her demands against the other, existing at the time of the suit, which are of such a nature as to be consolidated and which do not exceed one hundred dollars when consolidated, into one action or defense; and, on refusing or neglecting to do the same, shall forever be debarred from the privilege of suing for such a debt or demand." The plaintiff in that case was a lawyer who had a demand for services, earned in that capacity, which was made up of several items. Instead of bringing suit for the entire amount of his demand, he sued for only part of it, and recovered a judgment, and it was held that he could not thereafter sue for the balance.

The Rosenmueller case is to the same effect, but in the opinion of the court in that case no mention is made of the statute referred to in the Lucas case, although the court cites the Lucas case in support of its decision. In the Rosenmueller case the court said that "the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, a judgment upon the merits in either will be available as a bar in the other suits." In that case the plaintiff brought two actions for services rendered in two successive years and the court held that as both amounts had been due when the plaintiff sued for and recovered the amount claimed for the first year, he could not be permitted to recover in the action which he brought to recover the balance he

[illegible] "[illegible] [illegible] [illegible] [

claimed to be due for the services rendered the following year, and the reason the court gave for that decision was that "the claim for the respective years' services must be considered as growing out of the one contract made in 1874".

In the Nickerson case the court again referred to the statute mentioned by the court in the Lucas case, and referred to the fact that counsel in the Nickerson case had urged that, independent of the statute, when one had two or more claims against another, of such a nature as to be consolidated, and when consolidated they exceed the jurisdiction of a justice's court, he must bring his action in a court of competent jurisdiction having jurisdiction of such consolidated amount, and if he fails to do this, and sues on one of such claims before a justice of the peace, he will be barred from bringing any action on the other claims, in any court. The court then said, "The common law is incorrectly stated by appellant. It properly applies only when there is one demand, - not where there are two or more claims or demands."

In a later case cited by the plaintiff, McDole v. McDole, 106 Ill. 452, the Supreme Court said, "It may be regarded as a uniform and well settled rule of law that a party cannot split an entire cause of action, and bring two or more suits to recover different portions of the same debt. This rule is founded on a sound principle of public policy, which forbids the commencement and prosecution of vexatious law suits. Where a demand is entire, no reason can be perceived why it should be split up into two or more

claimed to be due for the services rendered, the following year and the reason the court gave for their decision was that "the claim for the relative value of services must be considered as vanished, only of the [illegible] a account made in 1874".

In the Kingsdown case the court [illegible] referred to the evidence adduced by the [illegible] in the "Lawrence", and referred to the fact that counsel in the Jefferson case had urged that, independent of the contract, more than two or more claims against another, if such a matter as to be consolidated, are then consolidated they create the jurisdiction of a Justice's court. In most cases the action in a court of competent jurisdiction having jurisdiction of such some liquidated amount, and if on trial before the Judge, and even on one of such claims before a jury, either of the parties, he will be barred from bringing any action on the other claims. [illegible] common law is incorrectly stated or overlooked. It [illegible] applies only when the [illegible] are two or more claims or demands.

In a later case also [illegible], Kendall v. Kendall, 108 Ill. 655, the [illegible] be regarded as a matter and [illegible] a party cannot split a single cause of action, and bring two or more suits to recover different portions of the same debt. This rule is based on a wholesome principle of policy, which forbids the harassment and persecution of vexatious law suits. Where a [illegible] is obtain, no reason can be perceived why it should be split up into two or more

actions, and thus subject a debtor to the payment of useless and unnecessary costs. But the question to be determined here is, whether the demand in question, within the meaning of the law, is to be regarded as entire, or is it capable of division into two separate and distinct causes of action."

It is the defendant's contention in the case at bar that the claim of the plaintiff was a single, entire claim and that his only reason for bringing his successive suits was to get within the jurisdiction of the Small Claim Division of the Municipal Court of Chicago. In our opinion, that contention is not borne out by the record. The trial court expressly found that the plaintiff had done separate jobs on separate buildings owned by the defendant, under distinct agreements between the parties. We are not able to say from our examination of the record that this finding of the trial court was against the manifest weight of the evidence. We find nothing in the record to show that the agreement made for the work and material furnished by the plaintiff on the building on Winona avenue, on which this action was brought by the plaintiff, was in any way connected with any of the other buildings on which the plaintiff was to furnish work and materials and which were owned by the defendant.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ, CONCUR.

actions, and thus subject a debtor to the payment of useless and unnecessary costs. But the question so determined here is, whether the demand in question, within the meaning of the law, is to be regarded as "trifle," or is it capable of division into two separate and distinct causes of action."

It is the contention of counsel in the case at bar that the claim of the plaintiff was a single, entire claim and that his only remedy for bringing his successive suits was to get within the provisions of the Small Claim Division of the municipal court of Chicago. In our opinion, that contention is not borne out by the record. The trial court correctly found that the plaintiff had been on cross fees on corporate buildings owned by the defendant, under distinct agreements relating the parties. We are not called on by the fact that the contention of the record that this finding of the trial court was against the manifest weight of the evidence. The evidence in the record to show that the agreements made for the sale and material furnished by the plaintiff on the building, on Wilson avenue, on which this action was brought by the plaintiff, was in any way connected with any of the other buildings on which the plaintiff's was to be paid upon the materials and which were owned by the defendant.

For the reasons above the judgment of the municipal court is affirmed.

Affirmed.

TAYLOR AND O'CONNOR, JJ., CONCUR.

264 - 30117

416

H. E. McCORMICK,

Appellee,

v.

S. SIMPSON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 659

Opinion Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This was a forcible entry and detainer proceeding heard by the trial court without a jury. At the conclusion of the hearing the court found the issues for the plaintiff and entered judgment in his favor for possession. To reverse that judgment the defendant has perfected this appeal.

In support of his appeal the defendant makes some contention to the effect that the premises in question were not the property of the plaintiff. It is elementary that a tenant will not be heard to question the title of his landlord. The defendant himself testified that he rented from the plaintiff under a verbal agreement calling for $25.00 a month as rent. He may not take that position and at the same time contend that his landlord did not own the property which he had rented from him.

The defendant makes the further contention that the landlord entered into an oral agreement with him to the effect that he, (the defendant) was to make certain repairs and reimburse himself by deducting the amount paid for the repairs

Opinion Jan. 20, 1926.

[illegible]

opinion of the court.

[illegible]

from the rent. The defendant gave testimony to that effect, and further testified that he had been in the premises, under his agreement with the plaintiff, for three months, and had paid the rent for that period at the stipulated amount of $25.00 per month. On the other hand, the plaintiff testified that the defendant had been a sub-tenant of the premises under a prior tenant and the plaintiff had been obliged to put that former tenant out, and at that time, because of his wife's illness the defendant urged the plaintiff to permit him to remain in the premises, and the plaintiff testified that he then told the defendant that if he would pay $25.00 a month, "and do any and all repairs he might need himself," he might remain and that the defendant replied that "he would take it under those conditions and make his own repairs."

At the conclusion of the testimony the court referred to that given by the plaintiff and commented on the fact that the defendant had been in possession over three months and had made certain repairs, which the defendant testified cost him from $50 to $75. And the court further pointed out that the fact that the defendant had paid his rent for the time he had been in possession, deducting nothing for the repairs he claimed to have made, indicated that the plaintiff's theory was correct, to the effect that the defendant was to pay $25.00 a month and make such repairs as he cared to make, in addition to that.

In order to reverse the judgment appealed from this court would have to be in a position to say that it was against the manifest weight of the evidence, and that, in our opinion, we are not in a position to do, from the

state of this record.

It is the contention of the plaintiff that the defendant was in arrears one month's rent. Although he contended he had paid the rent for three months and told the court he could show receipts for his payments, when he produced the receipts they only covered two months' rent.

We find no error in the record and the judgment appealed from is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

state officials record.

It is the contention of the ACLU that the defendant was a citizen and resident [illegible]. [illegible] contended in his said the week for [illegible] the court in court in [illegible] [illegible] produced the witnesses they only [illegible] [illegible] [illegible].

We find no error in the record [illegible] the [illegible] appealed from is affirmed.

"[illegible] [illegible]."

TAYLOR AND O'[illegible], [illegible].

4169

273 - 30126

PEOPLE OF THE STATE OF ILLINOIS, EX REL LEOPOLD SACHS, Appellee, vs. WILLIAM E. DEVER, et al, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

240 I.A. 659

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The relator, Sachs, filed a petition in the Superior Court of Cook County for a writ of mandamus, directing the respondents to issue a license to him to conduct a soft drink parlor at 5159 South Ashland avenue, in the City of Chicago. He had previously made the usual application for such a license and his application had been refused. The respondents filed an answer setting forth that section of the Municipal Code, giving the Mayor power to revoke a license when the person holding it violates any of the ordinances of the City, or statutes of the State, in the conduct of his business, and also the section of the Code giving the mayor discretionary power in passing upon applications for licenses. The answer denied that the petitioner was ready and willing to comply with all the ordinances of the City, as alleged in the petition, and also denied that he was a person of good moral character and reputation; and alleged that he had been found with intoxicating liquor in his possession on the premises for "use in connection with his business," in violation

PROVEN IN THE CITY OF [illegible],
IN THE [illegible] COURT.

Appellee,

vs.

WILLIAM A. DUNN, et al,

Appellants.

Appeal from [illegible]

Opinion filed Jan. 30, 1928.

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

The relator, [illegible] the [illegible] court of [illegible] for [illegible] of [illegible] proceedings to [illegible] petition filed [illegible] he had previously made [illegible] license and his application [illegible] filed an answer setting forth that section 24 of the [illegible] Code, giving the Mayor power to revoke a license to any person violating its provisions or the ordinances of the City, or obstruction of the [illegible] in the [illegible] and also the section of the [illegible] giving the [illegible] ary power in granting or refusing the licenses. The answer denied that the petitioner was ready and willing to comply with all the ordinances of the City, as required in the petition, and also denied that he was a person of good moral character and reputation. In a replication the relator found with intoxicating liquor in his possession on a [illegible] place for "use in connection with his business," in violation

of the ordinances of the City and Statutes of the State. No specific ordinance or statute is referred to in either the answer or the proof submitted by respondents, nor in the brief filed by them in this court. We may not take judicial notice of ordinances, but we do take such notice of statutes. Presumably, the prohibition act is the statute referred to. Counsel should not make reference to statutes generally but should point out the one relied upon. The evidence was heard by the court and the court found the issues in favor of the petitioner and ordered that a writ of mandamus issue, as prayed in the petition. From that judgment the respondents have perfected this appeal.

It is conceded by the parties that the granting or refusing of an application for a license such as that sought by the relator in the case at bar, is a matter lying within the discretion of the Mayor of the City, and that a writ of mandamus will not lie to direct the Mayor to exercise that discretion in a particular manner, except where it is proven the Mayor has acted arbitrarily and without investigating the facts involved, or has clearly abused the discretion reposed in him. The respondents contend that the facts shown by the evidence did not make out a clear case of abuse of discretion in the action which the Mayor took in refusing the application made by the relator for his license; while the relator contends, on the contrary, that the evidence made out a case of abuse of discretion on the part of the Mayor, with that degree of clearness which is necessary before the courts will interfere in such matters.

of the ordinances of the city and [illegible] of the [illegible]. No specific criterion or statute is relied on in either the answer or the proof adduced by respondents, nor in the brief filed by them in this court. We say not [illegible] judicial notice or reference. Just so do take such notice of statutes. Previously, the constitution and the statutes related to. General ordinances are not [illegible] to statutes generally but should point out the [illegible]. The evidence was [illegible] by the [illegible] to [illegible] issues in favor of the petitioner and against the [illegible] of [illegible], as [illegible] in the petition. [illegible] that judgment the respondents have petitioned this appeal.

It is conceded by the parties that the [illegible] or refusing of an licensing [illegible] license [illegible] by the relator in the case at bar, is a proper [illegible] the discretion of the [illegible] of the [illegible], [illegible] of mandamus will not lie to direct the [illegible] to exercise that discretion in a particular manner, except where it is proven the [illegible] has acted arbitrarily and with [illegible] the facts involved, or has clearly abused the discretion reposed in him. The respondents contend that the facts shown by the evidence did not [illegible] a clear case of abuse of discretion in the manner which the [illegible] took in [illegible] the application made by the relator for his license; while the relator contends, on the contrary, that [illegible] of abuse of discretion on the part of the [illegible], and in a [illegible] clearness which is necessary [illegible] the [illegible] will interfere in such matters.

The relator testified that prior to 1919, he had been a saloon-keeper, but that prohibition had put him out of business. He admitted that he had conducted what is commonly known as a soft drink parlor on the premises in question prior to the time of the application for the license involved here, and that in October 1923, police officers of the City came into those premises and found liquor hidden in a private stairway, leading up from the lower floor to the second floor where the relator lived. He further admitted that on that occasion he was placed under arrest and prosecuted in the Municipal Court of Chicago, and when it appeared at that hearing that the officers had not been in possession of a search warrant, the evidence which had been given was stricken and he was discharged. In describing the premises the relator testified that "the saloon is downstairs and my rooms are upstairs. There is a stairway leading from the saloon up to my rooms." He also testified that the stairway was the one that he used personally, leading up to his private rooms, and nobody else used it; and in order to get to this stairway, "I had to go back behind the bar." The relator further testified that the officers found some liquor in this stairway, - "I had a bottle that was my liquor, but I do not know who put it in there. I am not the owner of the liquor that was found in the private stairway."

It appeared that the relator had a partner whose name was Kohlman, at the time of making the application in question. The relator testified that Kohlman was not his

The witness testified that prior to 1919, he had been a saloon-keeper, but that prohibition had put him out of business. He admitted that he manufactured what is commonly known as a soft drink parlor on the premises in question prior to the time of the application for the license involved here, and that in October 1923, police officers of the City made an inspection premises and found liquor hidden in a cellarette entirely leading up from the lower floor to the second floor where the minister lived. He further admitted that on that occasion he was placed under arrest and prosecuted in the municipal court of Chicago, and that when he appeared at that hearing (he was not represented by counsel) in possession of a search warrant, the prosecution [illegible] was dismissed and he was discharged. In describing the premises the minister testified that the saloon is composed stairs and by rooms are operating. [illegible] leading from the saloon up to his rooms. He also testified that the chimney was [illegible] leading up to his private rooms, and [illegible] and in order to get to the chimney, [illegible] behind the bar. The minister further [illegible] officers found some liquor in this [illegible] a bottle that was my liquor, but [illegible] in there. I am not the owner of the liquor that was found in the private chimney."

It appeared that the relator is not a resident [illegible] was habitual, or the time of [illegible] in question. The relator testified [illegible] was not his

partner at the time the liquor was found on the premises. He also testified that the application for the license involved in these proceedings was not made by him but by Kohlman. There was a hall, in connection with the relator's premises, which he testified he used for the meetings of societies, and he stated that it was his intention to sell pop, near-beer and sandwiches.

One Hadden testified for the respondents that an application had been submitted for a license for the operation of a soft drink parlor on the premises in question, and he had made an investigation and recommended that the license be not issued, because a former license had been revoked. He testified he knew nothing against the character of the relator beyond that.

A sargeant of police and two officers testified that they went into the premises in question, in which the relator was operating a soft drink parlor, in the afternoon of October 30, 1923; that they opened a door leading from the bar to a stairway, and in a secret compartment formed by a hinged step, which was the third step up from the bottom of the stairway, they discovered a compartment in which they found a "bottle containing a half pint of moonshine whiskey," and also a teapot; that "it was in the stairway. I had to go out of the main saloon part or the soft drink parlor part to get into the stairway to find it. The half pint bottle was in the same compartment with the teapot. I talked to Sachs about that. I asked him and he said he did not know how it got there. I found in that hallway a teapot partly filled with moonshine whiskey and a bottle * * *

[illegible]

[illegible]

[illegible]

To the best of my belief the vessels contained moonshine whiskey * * * It had an alcholic smell. This is generally called moonshine. It was not good whiskey. The compartment that I found this liquor in was about the third step in the stairway and was hinged. I lifted it up and there was a compartment there with the bottle and the teapot there."

It is well settled that a writ of mandamus will not issue unless the petitioner shows a clear legal right to the writ and unless the party applying shows a clear obligation on the part ofthe party against whom the writ is sought, to do the thing which the petitioner seeks to have performed. Yates v. The People, 207 Ill. 316; The People v. Blair, 292 Ill. 139. Where the law designates a public officer as the one to receive an application for such a license as is involved here, and act upon it, and in so doing to exercise his discretion, and in such circumstances the officer denies the application, even though a court might be of the opinion that, acting as such officer, it would grant the permit, it would not follow, so long as there is latitude for the exercise of a sound discretion, that the act of refusal would be arbitrary or capricious. The law does not contemplate a transfer of the officer's function to a court or that the court shall sit in judgment on the exercise of his power, unless it is arbitrarily or capriciously exercised. People v. Schuettler, 209 Ill. App. 588.

In our opinion, the evidence in the case at bar to which reference has been made does not show a clear right on the part of the relator to the license for which he made

To the best of my belief the remarks cited have no relevance whatever to the law on slander and libel. It is particularly called attention. It was of great moment. The complainant said that "based this dispute in one about the fire stop in the attorney and one signed. I listen it to see there was a conversation there with the hostile and the tenant there."

It is well settled that a writ of mandamus will not issue unless the petitioner has a clear legal right to the writ and unless the party applying shows a clear obligation on the part of a public officer when the writ is sought, so as the "duty which the magistrate owes to have performed. Tates v. The Sheriff, 201 Ill. 318; The Sangamo v. Hight, 198 Ill. 188, where the law imposes a public officer the duty to issue a license to a [illegible] such a license as the law requires, and not upon it, and in so doing to deny the license to a licensee, and in such circumstances the officer denies the application, even though a court might be of the opinion on it, acting as such officer, it should grant the permit, it would be [illegible] so long as there is jurisdiction for the exercise of a sound discretion, it is not or refused [illegible] tary or opposition. The law does not [illegible] the [illegible] for of the official's function is a judge or that the court shall sit in judgment on the reasonable of the power, unless it is arbitrarily or a plainly erroneous. People v. Schmettler, 209 Ill. 4[illegible], 4[illegible].

In our opinion, the evidence in the case in [illegible] to which reference has been made does not show a clear right on the part of the relator to the license for which he made

application, nor does it show that in denying his application, the Mayor of the City exercised the discretion reposed in him by the law, arbitrarily or capriciously. We are, therefore, of the opinion that the evidence is not such as to warrant the finding made by the trial court and that court erred in entering its judgment that the writ of mandamus prayed for, be issued.

For the reasons stated the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

TAYLOR, J. CONCURS;
O'CONNOR, J. DISSENTING:

It appears from the brief filed on behalf of the defendants in this case that the Mayor of the City refused to issue Sachs a license for the alleged reason that Sachs had been violating the ordinances of the City of Chicago and the statutes of the State. No ordinance is pointed out in thebrief, which it is contended Sachs was violating; nor is any statute of the State pointed out in this regard. Where it is sought to reverse a judgment of a court, it is not sufficient merely to say that one of the parties has violated the laws of the State and the ordinance of the city. The particular ordinance should appear in the record and be pointed out in the argument, so also should the particular statute be pointed out so that this court can see whether the evidence in the record warrants the con-

application, nor does it show that in denying the injunction, the mayor of the city exceeded his discretion reposed in him by the law, arbitrarily or capriciously. We are, therefore, of the opinion that no error intervene in not such as to warrant the finding made by the trial court and said court erred in entering its judgment that the writ of mandamus prayed for, be issued.

For the reasons stated the judgment of the Superior Court is reversed.

Judgment reversed.

TAYLOR, C. CONCURS;
O'CONNOR, J. DISSENTING:

It appears from the brief filed on behalf of the defendants in this case that the mayor of the city refused to issue unto a license for the alleged reason that Rocks had been violating the ordinances of the city of Chicago and the statutes of the State. No evidence is pointed out in the record, which if it existed upon was violating; nor is any statute of the State cited which he is said to have violated. When a fact is sought to be proved in a court, it is not sufficient merely to say that one of the parties has violated the law of the state and the ordinance of the city. The particular evidence of a crime in the record and to be pointed out in a proceeding, as this should be the particular statute be violated, so that the court may see whether the evidence in the record supports the ...

clusion that the ordinances or the statutes have been violated. It is not the duty of this court to search through the statutes of the State in an endeavor to find out whether they have been violated. But it is the duty of counsel to point out specifically what law they contend has been violated. This has not been done in this case in any respect. All that appears, as stated by counsel for the defendants in their brief, is "The evidence shows that the petitioner was engaged in the operation of the premises at the time intoxicating liquors were being sold there, and that, therefore, the petitioner is not a person of good moral character and has violated the State laws and City ordinances relative to the sale of intoxicating liquors and consequently is not a proper person to be granted the license aforesaid." There is no evidence in the record that any intoxicating liquors were being sold on the premises, but all of the evidence is to the contrary. People v. Buse, 222 Ill. App. 638 (not reported in full). Again counsel for the city state in their brief on this point "The evidence clearly shows that the petitioner was the owner of the premises and was operating the premises at the time the liquor was found there by the police officers. Therefore, it is clear that the petitioner, Sachs, was violating the statutes of the State of Illinois and that the Mayor was justified in refusing to grant the license - in fact, it was his clear legal duty to refuse to grant the license." From the two quotations just made, and this is all that is said in the brief filed on behalf of the defendants, it appears that the defendants' contentions are

[illegible]

(1) that the evidence showed that there was intoxicating liquor sold on the premises; and (2) that intoxicating liquor was found on the premises. As stated, there was no evidence of any sale and no statute is pointed out that made it a crime or misdemeanor for him to have liquor upon his premises.

The majority opinion says that the evidence shows that Sachs had been guilty of a violation of the provisions of Sections 1 to 49, both inclusive of Chapter 43 of the Revised Statutes, which is the entire prohibition act. Of course, if one reads this statute, it is obvious that such a contention is unsound. A number of sections of that chapter contain provisions that render the possession of intoxicating liquors not unlawful under a number of circumstances. Moreover, I have some difficulty in understanding how Sachs has violated, for instance, Sections 1, 15, 16, 17, 27, etc., as the majority opinion holds he has done. A mere glance at these sections, and many others of the act will demonstrate, in my judgment, the unsoundness of the majority opinion and the difficulty a court may get into in attempting to find some alleged error, which is in no manner pointed out, upon which to base a reversal. But, as I have stated, the act is quite complicated and it is not the duty of this court to search through the statutes to find out whether some provisionsof them have been violated, where it is contended that by reason of the violations of the statute of the state, the judgment should be reversed. We must presume that the judgment is correct in all cases.

The law in this State has long been clearly settled

(1) that the evidence showed that [illegible] liquor sold on the premises; (2) that intoxicating liquor was found on the premises, [illegible] no evidence of any sale and no evidence [illegible] made it a crime or misdemeanor for him to give liquor upon his premises.

The majority opinion says that the evidence shows that Hogan had been guilty of violation of the provisions of section 1 of SF, page [illegible] of Chapter 42 of the Revised Statutes, which is the unlawful possession. Of course, if one sells this evidence, it is obvious that no possession is proved. A number of sections of this chapter contain provisions [illegible] intoxicating liquors but [illegible] a number of circumstances. However, I have been [illegible] "under-standing the Court's [illegible] 1, 2, 12, 16, 17, 27, [illegible] in the majority opinion [illegible] home. I more glance at these points, [illegible] the act will [illegible] in my judgment, [illegible] of the majority opinion [illegible] get into in attempting to [illegible] in no [illegible] but, [illegible] not the duty of [illegible] to search [illegible] to find [illegible] where it is contended [illegible] the situation of [illegible] in must assume that [illegible] in [illegible].

The law in [illegible]

to the effect that where a case is brought to a court of review and the judgment of the lower court is sought to be reversed, the burden in on the one who seeks to have the judgment reversed, to point out wherein it is wrong. Kiesh-Kowski v. Bostrom, 179 Ill. App. 73; C.& A. R.R. Co. v. Strawboard Co., 190 Ill. 268; Graham v. Dixon, 4 Ill. 115; Banfill v. Twyman, 172 Ill. 123. In the Bostrom case the court said (p.75) "The burden is always upon the party who avers error to make the same appear affirmatively. Nothing is to be presumed against a judgment. The error, if any is charged, must be definitely shown." In the Strawboard Co. case the court said in reference to the failure of the appellant to point out in the Appellate Court the objections claimed to have been made in giving instructions (pp 274-275) "Merely general statements that a ruling is wrong, without any attempt to point out wherein the error consists or to advance any reason or argument in support of the simple assertion that error has occurred, discloses nothing to adverse counsel, and does not impose upon a court of review the duty of instituting an investigation of the record to ascertain if error of some nature or kind may not be found." In the Dixon case the court said, (p.117) "Nothing is to be presumed against a judgment, but the inference is, that it is right, until the contrary appears." To the same effect is the Banfill case where the court said, (p.124) "Appellant has not, in his brief, pointed out any supposed error in admitting or rejecting evidence, and the assignments of error in that regard are abandoned." And in the case of Lanyon v. Michigan Buggy Co., 94 Ill. App. 243, it was held that counsel who claimed error had been committed

to the effect that the [illegible] case is brought to a [illegible] review but the judgment of the lower court [illegible] be reversed, the [illegible] on the one [illegible] judgment reversed, to point out wherein it [illegible] Kimball v. Jackson, 119 Ill. App. 73; [illegible] Greenhoud Co., 12 Ill. App. [illegible]; Lyons v. Lyons, [illegible] Burtis v. Tarpen, 190 Ill. 142. [illegible] the [illegible] said (p.73) "[illegible] in the party who seeks error to have the [illegible] Nothing is to be presumed against a judgment. The error, if any is obvious, must be affirmatively shown." In the Greenhoud Co. case the [illegible] failure of the appellant to point out the [illegible] court the objections of [illegible] instructions (pp.[illegible]). [illegible] a ruling is error, either [illegible] the error consists or in what way it shows or tends in support of the single assertion that error has occurred, [illegible] close nothing to support counsel, and does not [illegible] a court of review the duty of [illegible] of the record to ascertain if error of some kind or [illegible] may not be found." In [illegible] Nor does the court [illegible] "Nothing is [illegible] against [illegible], but the [illegible] lesson is, that it is [illegible] To the same effect [illegible] Kimball [illegible] where the court [illegible] (p.124) "Appellant has not, in his brief, [illegible] and quotations of error in the record [illegible] the case of Larson v. [illegible] [illegible] was held that counsel [illegible]

on the trial, must specially point out such alleged error. Likewise we held in the case of Bogert v. Chalmers & Williams, 207 Ill. App. 457, that any error complained of on appeal must be specifically pointed out in the brief. It is also the law that a court of review will not examine the record to find grounds for reversing, but may do so to find reasons for affirming the judgment. Shreffler v. Fuller, 208 ILL. App. 630.

886 - 30139

WOODLAWN MOTOR CAR SALES & SERVICE CO., a corp.,

Appellant,

v.

DENNIS J. EGAN, Bailiff et al,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 660

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

One Joseph N. Pepin, the owner of a Paige automobile, executed a chattel mortgage on it, to secure a balance due in connection with its purchase. At the time in question a balance of $227.00 remained due under the chattel mortgage. One Thomas Vanderwarfe procured a judgment in an action brought by him against the owner of the automobile, and on an execution issued on said judgment, the automobile was taken in possession by the defendant Egan, as Bailiff of the Municipal Court of Chicago. Thereupon, the plaintiff Woodlawn Motor Car Sales & Service Co., declared the balance remaining unpaid on the chattel mortgage it held, due, under the insecurity clause of the mortgage and this action of replevin was brought, with Egan and Vanderwarfe as parties defendant. The car was taken under the writ of replevin, from the defendant Egan.

Opinion filed Jan. 20, 1936.

Plaintiff alleged in its declaration that the automobile had been wrongfully taken and was being wrongfully detained by the defendant Egan. To this declaration the defendant Egan filed a plea denying the wrongful taking alleged, and also another plea denying that he was wrongfully detaining the car, and further, a plea denying that the automobile was the property of the plaintiff. The defendant Vanderwarfe filed pleas similar to the first two filed by the defendant Egan, and also a third plea alleging that the automobile was the property of Vanderwarfe, and another plea alleging that Vanderwarfe "did, before the commencement of the replevin action, tender and offer to pay to the plaintiff $337.00, the amount due under the mortgage executed by Joseph H. Pepin and held by the plaintiff." The plaintiff took appropriate issue on these several pleas, including the last one. The issues thus formed were heard by the trial court, after which a finding was entered against the plaintiff, on the issue of the tender. Judgment was accordingly entered, directing that the automobile be returned by the plaintiff. From that judgment the plaintiff has perfected this appeal.

In support of its appeal the plaintiff contends that the plea of tender presented an immaterial issue and should have been demurred to, but the fact that a replication was filed denying the tender, did not cure the defect. In our opinion the plea did not present an immaterial issue. As far as the mortgage is concerned, the only right it gave the plaintiff was a lien on this automobile, to secure the

Plaintiff alleges in his second count that the automobile had been wrongfully taken and was being wrongfully detained by the defendant in error. In this jurisdiction the defendant upon filed a plea denying the wrongful taking alleged, and also another plea denying that he was wrongfully detaining the car, and thereby, a fact charging that the automobile was the property of the plaintiff. The defendant Fordbrewerk filed three similar to the first two filed by the defendant Lyon, and also a third plea alleging that the automobile was the property of Ford Motors, and another plea alleging that Fordbrewerk "did, before the commencement of the ex parte action, tender and offer to pay to the plaintiff $ etc. The amount so tendered the motions executed by Joseph A. [illegible] and by the [illegible] tiff." The learned trial judge [illegible] in these several pleas, including the first two. The [illegible] heard by the trial court, after which a judgment was entered against the plaintiff, in the [illegible] was accordingly entered, directing [illegible] returned by the plaintiff. Upon that judgment the plaintiff has perfected a [illegible].

In support of his second [illegible] contends that the plea of tender properly [illegible] should have been [illegible], [illegible] plea was filed denying the [illegible]. [illegible] in not sustaining the [illegible] demurrer. [illegible] the plaintiff was a lien on the automobile, by [illegible]

payment to the plaintiff of the balance remaining due on the mortgage. If the plaintiff received that amount it had no further interest in the automobile. Such a tender was made to the plaintiff and refused. So far as the issue raised by the plea of tender is concerned, we are of the opinion that the trial court did not err. On the trial of this case all the evidence on this issue was received on the theory that the plea was proper for issue was duly joined on the plea, and the plaintiff will not be permitted to change its position, after coming to this court on appeal. Although some other matters seem to have been raised in the trial court, no argument is presented about them in this court and they must, therefore, be considered as waived.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, J. CONCURS;
TAYLOR, J. DISSENTS.

payment to the plaintiff of the balance remaining due on the mortgage. If the plaintiff received this money it has no further interest in the automobile. Such a tender was made to the plaintiff and refused. So far as the issue raised by the plea of tender is concerned, we are of the opinion that the trial court did not err. In the trial of this case all the evidence as this issue was received on the theory that the plea was proper, or for issue was duly joined on the plea. The mix matter will not be permitted to change its position, after coming to this court on appeal. Although some other matters seem to have been raised in the trial court, no argument is presented upon them in this court and they such, therefore, be considered on appeal.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGES ALL CONCUR.

GIDEONSE, J. DISSENTING;
TAYLOR, J. DISSENTING.

304 - 30157

4991

EDWARD E. COLLINS,

Appellee,

v.

E. P. FOURNIER AND MINNESOTA MUTUAL LIFE INSURANCE CO., GARNISHEE,

MINNESOTA MUTUAL LIFE INSURANCE CO., GARNISHEE,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 660

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff Collins brought an attachment suit of the fourth class in the Municipal Court of Chicago, against one Fournier, the basis of the attachment being that the defendant was a non-resident. A writ of attachment was issued on September 27, 1924, against Fournier as defendant and the Minnesota Mutual Life Insurance Company, as garnishee. This writ was served on the Insurance Company on September 29, 1924. No service being had on Fournier, publication was made as to him, and he was defaulted on November 24, 1924. On the same day, the court assessed the plaintiff's damages at $418, on the affidavit of claim he had filed; and also entered a conditional judgment against the garnishee for that amount, and directed that a writ of scire facias issue, as provided by law.

Opinion filed Jan. 20, 1936.

opinion of the court.

The plaintiff, William [illegible], [illegible] of the fourth class in the [illegible] [illegible], one January, the [illegible] defendant was a [illegible]. [illegible] issued on December 21, 1934, [illegible] was and the [illegible] [illegible] certificate. [illegible] on December 20, 1934. [illegible] qualified [illegible] November [illegible], 1934. [illegible] the qualifications [illegible] be met filed, [illegible] against the [illegible] [illegible] a writ of [illegible] [illegible].

The writ of scire facias was issued under date of November 25, 1924, and was served on the garnishee on December 2, 1924. The answer of the garnishee was filed on December 29, 1924. By its answer the garnishee set forth that at the time of the service of the writ of scire facias it was not indebted to the defendant in any amount and held no property, moneys or credits of his in its custody or possession. The garnishee further set forth in its answer that prior to November 20, 1924, the defendant Fournier had been employed as its general agent under a contract, copy of which was attached to the answer, and that on that date said contract was cancelled and terminated; that at the date of such cancellation, no amounts were owing from it to Fournier and that no commissions were or would be payable to him under the contract; that at the date of the termination of the contract, Fournier was indebted to it in the sum of $1521.96, and that he had continued to be indebted to the garnishee in that amount, ever since.

Under the terms of the contract attached to and made a part of garnishee's answer, said contract being entered into between the garnishee and Fournier, under date of January 22, 1924, Fournier was made the general agent of the garnishee Insurance Company, at San Francisco; and in consideration of the services to be rendered by him, the company agreed to pay him certain specified commissions upon all premiums collected by the company. Under the terms of the contract the company further agreed to pay Fournier "for general agency expenses during the continuance of this con-

The work of police training [illegible]
of November 25, 1944, [illegible]
on December 1, 1944. [illegible]
filed on December 20, 1944, [illegible]
set forth [illegible]
of police training [illegible]
any amount [illegible] priority, [illegible]
his in its capacity [illegible]
set forth in its answer [illegible]
the [illegible]
equal under a contract, [illegible]
amount, [illegible]
and contended that [illegible]
authorize [illegible] it [illegible]
misuse [illegible]
that [illegible]
was [illegible]
continued [illegible]
ever since.

[illegible]
made a [illegible]
as into [illegible]
July 20, 1944, [illegible]
provides [illegible]
adjustment of the services to be furnished by [illegible]
agreed to [illegible]
provisions [illegible]
[illegible]
[illegible]

tract in proportion to the company's business an expense allowance" of $6.00 on every $1,000 of the first $500,000 of business sent in by him, in any one contract year, and $3.00 on every $1,000 of business over and above that amount. This paragraph of the contract then provided that "against said allowances the company agrees to advance the general agent Two Hundred and Fifty Dollars ($250) per month payable in two equal monthly installments on the 15th and last days of each month. The general agent promises and agrees to pay the company, upon the anniversary date hereof in each year or upon the earlier termination hereof, an amount equal to the advances made hereunder, less the amount of expense allowance actually earned by the general agent under the terms hereof." It will not be necessary to note here the many other provisions of the contract.

On January 8, 1925, the plaintiff filed certain interrogatories and the garnishee was ruled to answer them within fifteen days. On January 19, 1925, the garnishee filed its answers to the interrogatories which had been filed by the plaintiff. These answers were to the effect that up to November 20, 1924, Fournier had been the general agent of the garnishee Insurance Company at San Francisco, under a written contract, copy of which was attached to and made a part of the garnishee's answers to the interrogatories; this being the same contract above referred to, which was made a part of the answer filed by the garnishee in response to the writ of scire facias. The answers of the garnishee to the interrogatories of the plaintiff, further set forth

based in proportion to the company's actual in expense allowance of $8.00 on every $1,000 of the first $5,000 of business sent in by him, in any one calendar year, and $3.00 on every $1,000 of business sent in above that amount. This paragraph of the contract then provides that "against said allowance the company agrees to advance the general agent Two Hundred and Fifty Dollars ("$250") per month payable in the equal monthly installments on the 15th and last days of each month. The general agent undertake and agrees to pay the company, upon the anniversary of the second year or upon the earlier termination hereof, an amount equal to the advances so in hereunder, less the amount of expense allowance actually earned by the general agent under the terms hereof." It will not be necessary to note here the many other provisions of the contract.

On January 6, 1955, the plaintiff filed certain interrogatories and the defendant was ruled to answer them within fifteen days. On January 14, 1955, the defendant filed its answers to the interrogatories which had been filed by the plaintiff. These answers were to the effect that up to November 30, 1954, no contract had been in effect between the general agent of the Guardian Insurance Company of America, under a written contract, copy of which was attached to the made a part of the defendant's answers to the interrogatories, this being the same contract above referred to, which was also a part of the answer filed by the defendant in response to the writ of Mandamus. The answers of the defendant to the interrogatories of the plaintiff, however, set forth

that on September 27, 1924, (the day of the issuance of the attachment writ) Fournier was indebted to the garnishee in the sum of $1496.50, on account of advances made to him under his contract for agency expenses, the amount of said indebtedness being the excess of advances over the expense allowance to which he was actually entitled under the terms of his contract on the business sent in to the company by him. In its answers to the interrogatories, the garnishee set forth further, that on December 18, 1924, Fournier was indebted to the garnishee in the sum of $1561.13, and that on January 6, 1925, this indebtedness amounted to $1567.72. The garnishee further answered that it had paid Fournier nothing since September 27, 1924, and that at said date he had previously received all commissions and premiums theretofore collected through his office, with the exception of two policies, the premiums for which had been paid to the Company by Fournier under date of January 5, 1925, he having deducted from his remittance his commissions on those premiums. The garnishee further stated that these two policies were unfinished business, pending at the time the company terminated its contract with Fournier in November, and it stated that it had no knowledge of the time when Fournier had actually delivered these policies and collected the premiums from the insured. One of these premiums amounted to $16.13 and the other to $15.35.

Under date of January 19, 1925, the garnishee filed an amended answer, again setting up the cancellation of its contract with Fournier on November 20, 1924, and stating that

that on September 27, 1924, (the day of the issuance of the attachment writ) Fournier was indebted to the plaintiff in the sum of $1498.30, on account of advances made to him under his contract for supply co,mmis, the amount of said indebtedness being the excess of advances over expenses allowance to which he is entitled, by actual and the terms of his contract on the business sent in by the company by him. In his capacity of his insurance,solicitor, the plaintiff set forth further, that on November 13, 1924, Fournier was indebted to the plaintiff in the sum of $1881.15, and that on January 8, 1925, this indebtedness amounted to $1847.75. The plaintiff further asserted that it had paid Commissioner Hedley, acting solicitor 27, 1924, and that it said fees he has actually received all commissions and premiums collected above the latter, and the payment of two judgments, the amounts for which have been paid to the company by his mother since the of January 8, 1925, he having demanded from his mother the statements on those premiums. The plaintiff further asserted that these two judgments were unjustified because at the time the company instituted the proceedings Fournier in November, and it asserted that it had no knowledge of the time when Fournier had actually delivered the policies and collected the premiums from the [illegible]. The of these premiums amounted to $13,32 more than the $13,32.

Had a date of January 15, 1925, the plaintiff filed an amended answer, again pleading as the consideration of the contract with Fournier on November 25, 1924, and claiming that

at that time as well as at the time of the service of the writ of scire facias upon it, no amounts were owing from it to Fournier, but, on the contrary, he was indebted to the company in the sum of $1567.72.

On interrogatories filed by the plaintiff and the answers thereto by the garnishee, the trial court found the issues against the garnishee and found that there was due and owing to the defendant, Fournier, from the garnishee, the sum of $500. Under date of February 13, 1925, judgment was entered against the garnishee in the sum of $439.20. Other proceedings were subsequently had in the trial court, which it will not be necessary for us to consider on this appeal, which the garnishee has perfected from the judgment entered against it.

On this record, we are of the opinion the trial court erroneously entered judgment against the garnishee. In support of the judgment appealed from the plaintiff has called our attention to a number of cases, and among them Gannon v. Tyree, 148 Ill. App. 99; Felsenthal Bros. & Co. v. Gradwohl, 217 Ill. App. 170; and Hall v. Bird-Bergstrom Motor Car Co., 227 Ill. App. 587. In our opinion, these cases are all clearly distinguishable from the one at bar. Those cases were all actions brought by an agent against his principal, to recover advances which it was alleged the principal had undertaken to pay without regard to the amount of business done by the agent, although it was provided that the advances were to be charged against the commissions earned by the agent on the business done by him. In each of the cases re-

[illegible]

ferred to it was pointed out that under the contracts there involved, it was clearly not the intention of the parties that the amounts which the principal undertook to advance to the agent, from time to time, should be repaid to the principal in case the agent's commissions did not equal the advances. That is not at all the situation presented here. In the contract existing between the parties in the case at bar, the garnishee Insurance Company agreed to make Fournier an expense allowance for his general agency expenses, equal to a specified proportion of the business done by him. Not only did the contract between the parties provide that against that allowance the company would advance Fournier $250 per month, but Fournier agreed to pay these advances back to the company at the end of each year, or earlier in case of the termination of the contract, deducting from such advances whatever amount of expense allowance the business done by him actually earned, according to the terms specified in the contract. According to the answers filed by the garnishee, no showing having been made to the contrary, the advances which the garnishee had made to Fournier largely exceeded the expense allowance to which he was entitled under his contract, at the time the original attachment writ was sued out, and this condition continued to exist at all times after that. It further appears that Fournier's agency contract was terminated by the company prior to the time the company filed its answer as garnishee, at which time he was likewise largely in debt to the company, for the excess of advances received by him over the amount of expense

allowance to which, he was entitled. No payments of any kind were made to him by the garnishee after the date of the issuance of the attachment writ, disregarding the few dollars he retained when he remitted the Company's share of the two small premiums early in January; these policies representing business pending and unfinished at the time his contract was terminated.

In view of the fact that the contract between the garnishee and the judgment debtor was terminated, leaving the latter largely indebted to the garnishee prior to the filing of the garnishee's answers and all the other elements of the situation as disclosed by the answers filed by the garnishee to the interrogatories, we are of the opinion that at no time after the beginning of this action did the debtor have any claim which could have been enforced against the garnishee. That being the situation, the judgment entered by the trial court should have been in favor of the latter.

For the reasons given, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

allowance to which, he was entitled. No payments of any kind were made to him by the Petitioner after the date of the issuance of the attachment writ, disregarding the two dollars he retained when he returned the company's share of the two small premiums early in January; these policies representing business pending and outstanding at the time his contract was terminated.

In view of the fact that the contract between the petitioner and the Judgment Debtor was terminated, leaving the latter largely indebted to the petitioner prior to the filing of the petitioner's answer and all the other allegations of the situation as disclosed by the papers filed by the petitioner to the interrogatories, we are of the opinion that at no time after the beginning of this action did the Court have any claim which can be here now enforced against the petitioner. That being the situation, the judgment entered by the trial court should have been in favor of the Petitioner.

For the reasons given, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

TAYLOR and O'CONNOR, JJ., concur.

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442

CHARLES G. COSTELLO, a minor, by Mark Costello, his next friend,

Appellee,

v.

THREE PRODUCTS COMPANY, a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 660

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant company seeks to reverse a judgment for $3500.00, entered against it in favor of the plaintiff in the Superior Court of Cook County, in an action brought by the plaintiff, to recover damages resulting from personal injuries sustained by him, as a result of the alleged carelessness of an employee of thedefendant, in driving an automobile truck. The plaintiff's declaration, consisting of one count, alleged that the driver of the defendant's truck, desiring to wash it at the fire hydrant in front of a City fire station, located on the west side of south Elizabeth street, just south of the east and west alley between 47th and 48th streets in the City of Chicago, drove the truck to that point and stopped along side of the west curb of the street, just north of the alley, with the truck facing south. The declaration alleged that the plaintiff, a minor eleven years old, was immediately behind and north of the

[illegible] - [illegible]

CHARLES O. [illegible], a minor, by)
[illegible], his next friend,)
)
Appellant,)
)
v.)
)
THE [illegible] COMPANY, a)
corporation,)
)
Respondent.)

Opinion filed Jan. 20, 1926.

Mr. [illegible] [illegible] delivered the opinion of the court.

By this record the [illegible] company seeks to reverse a judgment for plaintiff, [illegible], entered in favor of the plaintiff [illegible] the [illegible] court of [illegible] county, in an action [illegible] by the [illegible], [illegible] cover damages resulting from personal injuries sustained by him, [illegible] employed conductor. [illegible] employers of transportation, in driving an automobile [illegible], the plaintiff's testimony, consisting of [illegible], alleged that the driver of the [illegible], [illegible], [illegible] ing to wash it on the [illegible] [illegible] fire station. Looking on the west [illegible] street, just south of the [illegible] and 47th streets in the city of [illegible], [illegible] to test [illegible] and stopped along side of the west curb of the street, just south of the [illegible], [illegible] south. The [illegible] [illegible] eleven years old, was immediately behind [illegible] of the

rear end of the truck as it stood at that point, and in such a position with reference to the truck that if it should be backed to the north without warning, he was liable and likely to be injured; and that the driver of the truck, negligently did back the truck to the north, without warning, while the plaintiff was in the exercise of ordinary care for his own safety, and struck the plaintiff, knocking him down and running over his left hand, inflicting the injuries complained of. Issue was joined by proper pleas filed by the defendant. The cause was tried before a court and jury and the jury found the issues for the plaintiff and assessed his damages at the sum of $3500.00 Judgment being entered on that verdict, this appeal followed.

The plaintiff gave testimony supporting the allegations of his declaration, stating that just before he was hurt he was standing in the street just north of the truck, facing north; that he did not know the truck was going to move and heard no warning, either from the truck driver calling out or from any other signal; that the truck backedup about ten feet, stricking against him and throwing him forward, to the north, on his stomach; and as he fell he threw out his hands at an angle of approximately 45 degrees, and as the truck backed up, the rear wheel on the west side ran over his left hand. He testified that after this happened and the truck came to a standstill, he scrambled out between the wheels of the truck, on the west side near the sidewalk. He said he did not have hold of the truck nor was he touching it at the time it backed up.

rear end of the truck as it stood [illegible] point, and in such a position with reference to the truck that if it should be backed to the north without warning, he was liable and likely to be injured; [illegible] the driver of the truck, negligently and [illegible] the truck to the north, without warning, while the plaintiff was in the exercise of ordinary care for [illegible] safety, and struck the plaintiff, knocking him down and running over his left hand, inflicting the injuries complained of. Issue was joined by general plea filed by the defendant. The cause was tried before a court and jury and the jury found the issues for the plaintiff and assessed his damage at the sum of $[illegible] dollars, [illegible] entered on their verdict, which appeal followed.

The plaintiff gave testimony supporting the allegations of his declaration, stating that just before he was hurt he was standing in the street just north of the truck, facing north; that he did not know the truck was going to move and heard no warning, either from the truck driver calling out or from any other sign; that the truck backing about ten feet, striking [illegible] and throwing him forward, to the north, on his stomach; and as he fell he threw out his hands at an angle to [illegible] mately 45 degrees, and as the truck backed up, the rear wheel on the west side ran over his left hand. He testified that after this happened the truck came to a standstill, he scrambled out from u the wheels of the truck, on the west side near the sidewalk. He says he did not have hold of the truck nor was he touching it at the time it backed up.

At the time the defendant's driver arrived at the point where the accident happened, one Healy, a fireman attached to the first station above referred to, was washing his automobile at the fire hydrant. Apparently the defendant's driver stopped his truck north of the alley to wait until Healy had finished washing his car. Healy was called as a witness for the plaintiff and testified that he finished washing his car shortly after the defendant's driver arrived. He testified that when he was through washing his car, the defendant's driver, who had left his truck and walked over into the engine house, came out and walked back to his truck, apparently to drive it up to the fire hydrant; that he did not hear the driver say anything to anybody; that he (the witness) got into his car to move away from the fire plug, and "pulled up to the center of the street and then I heard them all hollering and a little boy got hurt."

Tony Albrecht, a boy about 12 years old at the time in question, testified that the plaintiff was standing about three feet back of the truck when it moved backward 8 or 10 feet, knocking the plaintiff down, face forward with his hands stretched out so that his left hand was run over by the back wheel of the truck; and that he did not hear any warning before the truck backed up and that the driver of the truck said nothing before he started the truck. The witness named several of the group of boys who were standing about at the time. He testified that he was standing on the curbstone near the rear end of the truck, with a boy named

At the time the defendant's driver received it the point where the accident happened, one could, and was attached to the first station wagon relevant to, see reading his automobile [illegible] the system. Apparently the defendant's driver stopped his truck north of the alley to wait until Hedy had finished crossing the car. Hedy was called as a witness for the plaintiff and testified that he finished crossing [illegible] after the defendant's driver arrived. He [illegible] that [illegible] was through walking his car, the [illegible] driver, who had left his truck and walked over into the [illegible] house, came out and walked back to the truck, apparently to drive it up to the fire 'pumper'; that he did not [illegible] the driver any anything to anybody; that he [illegible] his car to move away from the fire plug, and 'parked' [illegible] center of the street [illegible] and a little any not more.'

Tony Liberati, a boy about 12 years [illegible] the time in question, testified that the [illegible] was standing about three feet back of the truck when it [illegible] 8 or 10 feet, smoking the [illegible] [illegible] the back [illegible] the back wheel of the truck, and [illegible] the truck [illegible] witness stand [illegible] about at the time. He testified that he [illegible] the [illegible] the rear end of the truck, with a boy named

Nosek. He was asked whether he saw anybody chasing boys away from the truck and he said he did not.

Edward Nosek was about 9 years old at the time of the occurrence in question. He also testified that the plaintiff was several feet from the truck when it backed up and knocked him over on his stomach, - "he fell down and spread his hands and the hind wheel ran over the left hand. The truck ran ten or five feet back." He testified further that he did not hear the driver of the truck say anything nor did he come around behind the truck before he started to back, - "He just went on the truck and started. He did not blow a horn. * * * I did not see any boys on the truck and I did not see any boys chased away from the truck." On cross-examination this witness was shown a written statement purporting to have been signed by him shortly after the accident happened. The witness identified his signature at the bottom of the statement. He was asked whether he told the representative of the defendant, at the time this statement was taken, that he saw the driver of the truck come out of the fire house and that the driver told the boys to get away from there, andalso whether he told the representative at that time, that he saw the plaintiff on the curbstone with one hand leaning against the truck; and he testified that he did not remember. On redirect examination this witness testified that he never read over the statement prior to the time he was testifying. He further testified that he did not see the driver chase any boys away from the truck nor did he hear him say anything to the boys.

house. He was asked whether he saw anybody chasing boys away from the truck and he said he did not.

Edward Moses was about 8 years old at the time of the occurrence in question. He also testifies that the plaintiff was several feet from the truck when it backed up and knocked him over on his stomach. - "He fell down and spread his hands and the blind wheel ran over the left hand. The truck ran ten or five feet back." He testified further that he did not hear the driver of the truck say anything nor did he come around behind the truck and started to back. - "He just went on the truck and started. He did not blow a horn. " " " I did not see any boys on the truck and I did not see any boys chased away from the truck." On cross-examination this witness was shown a written statement purporting to have been signed by him shortly after the accident happened. The witness identified his signature at the bottom of the statement. He was asked whether he told the representative of the defendant, at the time this statement was taken, that he saw the driver of the truck come out of the Fire House and that the driver told the boys to get away from there, adding that he did are representative at that time, that he saw the plaintiff on the sidewalk with one hand leaning against the truck; and he stated that he did not remember. On redirect examination this witness testified that he never had any statement other to the fire he was testifying. He further testified that he did not see the driver chase any boys away from the truck nor did he hear anything to the same.

3 Another boy in the group who were present at the time the plaintiff was injured, was Charles Reid. He was about ten years old. He testified that after the fireman Healy finished washing his car, he saw the defendant's driver go to his truck, north of the alley, and back up; that he did not notice whether the driver said anything to anybody before he started to back; that he did not hear him say anything before he got on his truck; that the boys who were present at that time were back near the rear end of the truck; that the plaintiff was standing back of the truck and was knocked down. This witness was also shown a statement which hehad signed shortly after the occurrence, and he was asked whether or not the things set down in that statement about this accident were true, and he said some were not. He was asked which part was not true and he answered, "where he yelled to the boys." He was asked whether he told the defendant's representative at the time this statement was taken that the driver yelled at the boys; and he said he had. He was then asked, "Then he put it down on this paper?" and he answered, "Yes, sir; he was contradicting me and I could not tell it straight." It appears that this boy's parents and an older brother were present at the time this statement was taken. He testified that neither of them read the statement over at the time it was taken, but that he had read it. He further testified that the boys did not have hold of the truck that he knew of; that he did not see the plaintiff fall, as he was standing over in front of the engine house; that the plaintiff was standing back of the truck when it backed up and he was not leaning against it. On redirect examination he testified

3 Another boy in the room who was present at the time the plaintiff was injured, was Jack Vale Dale. He was about ten years old. He testified that after the fireman nearly finished washing his car, he saw the defendant's driver go to his truck, north of the alley, and turn up; that he did not notice whether the driver said anything to anybody before he started to back; that I did not hear him say anything before he got on his truck; that the boys who were present at that time were to east the rear end of the truck; that the plaintiff was standing back of the truck and was backed back. This witness was also shown a statement which bears signed shortly after the occurrence, and he was asked whether or not the things set down in that statement concerning this accident were true, and he said some were not. He was asked which part was not true and he answered, "where he yelled to the boys." He was asked whether he told the defendant's representative at the time this statement was taken that the driver yelled at the boys, and he said he did. He was then asked, "Then he put it down on this statement" and he answered, "Yes." After he was instructed to read I could not tell it correctly." It appears that this boy's mother and no other brother were present at the time this statement was taken. He testified that neither of them read the statement over at the time it was taken, but that he had read it. He testified that the boys did not have hold of the truck [illegible]; that he did not see the plaintiff fall, as he was standing over in front of the engine house; that the plaintiff was standing back of the truck when it backed [illegible] was not leaning against it. On redirect examination [illegible]

that he did not hear the defendant's driver yell to the boys.

For the defendant, the driver of the truck, one Mensik, testified that when Healy was through washing his car he (the witness) walked back from the engine house to his truck and saw some boys behind it, - "A whole mob of them; * * * I chased them away and started my motor and as I started my motor I heard them there again, and I chased them away again, - chased them to pretty near 47th street again, and then I came back and got on and the first thing I heard them back on; I heard them romping on the back of the truck again. * * * and I got out and chased them, and after I got on * * * and saw no one around I started to back slowly, and I don't think I backed a foot when I heard a boy scream." He testified that when he cashed the boys away he "hollered for them to get away from there or you are going to get hurt." On cross-examination this witness testified again that when he chased the boys away from the truck, "they ran towards 47th street and they scattered all over the lot across the street." At another point he testified that he "chased them clean to 47th street * * * This time I chased them all the way to 47th street about 125 feet. They all ran toward 47th street and some a little way east. I went to 47th street myself, chasing them all the way * * * and when I got on the last time I heard nobody." He testified that it was necessary for him to back the truck up a little before going forward so as to get around Healy's car which had been backed into the alley and was "sticking out of the alley, - say three or four feet."

that he did not hear the detailed, intent part of the boys.

For [illegible] Jackson, [illegible] in [illegible] time, one Monday, [illegible] that when Andy was through washing the car he (the witness) noticed [illegible] to his truck and saw some boys behind it. - "I think [illegible] of them; " " " I chased them away and started to drive and as I started my motor, I heard them [illegible] again. As I passed them away again, - chased them to [illegible] again, and then I came back [illegible] I heard them [illegible] on; I heard some [illegible] the back of the truck again. " " " and I got [illegible] them, and after I got on " " [illegible] I swerved to hear clearly, and [illegible] I heard [illegible] heard a boy scream." He [illegible] the boys away be 'bolstered for [illegible] away from there or somebody going to get hurt.' He [illegible] this situation testified again that when he chased the boys away from the truck, 'they ran towards Cyril [illegible] they ran around all over the lot across the street.' He [illegible] testified that he 'chased them clean to [illegible]' " This time he chased them all [illegible] 150 feet. They all ran towards the street [illegible] way home. I went to lift a crate quickly, [illegible] the way " " " and then I got on the left [illegible] He testified that it was necessary for him to move the truck up a little before going forward so as to [illegible] Andy's car which had been parked into the alley [illegible] out of the alley, - say three or four feet.'

The testimony given by the latter witness as to the reason for backing his truck does not find support in the testimony of any of the other witnesses. According to the testimony of Healy, his car was out near the middle of the street and just being driven away from the fire plug at the time the plaintiff was hurt. The driver was further materially contradicted by another witness, for the defendant, namely, Thomas Doherty, a boy about twelve years old, who testified that he was standing at the corner of 47th street at the time the plaintiff was injured. He testified he saw the driver get off his truck and go into the engine house but that he did not see him after that until he heard the plaintiff cry out, at the time he was injured. This witness testified that he did not hear the driver say anything to the boys. Certainly this witness would have given very different testimony if the driver had done all the "hollering" and chasing he described in his testimony.

One Sullivan was called as a witness by the defendant and testified that he was standing over in front of the fire house at the time the plaintiff was hurt; that he saw a group of boys playing around the truck; that he saw the truck driver go toward his truck and then he noticed the boys running the other way "and then I saw one boy near the curbstone, near the back wheel, and I ran and picked him up." He further testified that as the driver went toward his truck he heard him say something but he did not hear what it was; that he thought he said it to the boys and they ran the other way; that the driver was on the street when he said something

The testimony given by the latter witness as to the reason for leaving his wagon does not find support in the testimony of any of the other witnesses. According to the testimony of Hogly, [illegible] just the middle of the street and just [illegible] driver [illegible] time going at the time [illegible] was further materially contradicted by another witness, for the defendant, namely, Thomas [illegible], a boy about twelve years old, who testified [illegible] at the corner of [illegible] was injured. [illegible] stood on [illegible] him after that until he [illegible] the time he was injured. This witness testified that he did not hear the driver say anything [illegible]. Certainly this witness would have given very different testimony if the driver had done all the "hollering" and cursing he described in his testimony.

One Smiley was called [illegible] witness by the defendant and testified that he was standing [illegible] the fire house at the time the accident occurred; that he saw a group of boys playing around the truck; that he saw the truck driver go toward the [illegible] and then he drive the truck away; that he heard the driver say "and then I saw the boy run[illegible] the other way" and then [illegible] "stone, hurt the back wheel, [illegible] and jumped from up." He further qualified that as the driver [illegible] the truck he heard him say something, but [illegible] that he thought he said it to the boys [illegible] the other way; that the driver was on the street [illegible] something

to the boys "straight from the bumper of the truck;" that the plaintiff was behind the rear right wheel and west of the truck when he picked him up. On cross-examination this witness testified that the truck was standing about 20 feet north of the alley and that the driver was about even with the alley, walking from the hydrant toward the truck, "at the time he said this thing, whatever it was ? " " and then he walked right up and then ran around the truck on the east side of it, made a circle around it and came back on the west side."

The defendant offered in evidence the two written statements, one signed by the witness Nosek and the other by the witness Reid. The statement signed by Nosek was to the effect that he did not see the driver of the truck chase the boys off the truck; that he saw the driver of the truck come out of the fire house and he told the boys to go away from there; that he saw the plaintiff on the curb with one hand leaning against the truck; that the truck backed up about a foot and the plaintiff fell down "and the wheel ran over his right hand." The statement signed by Reid was to the effect that the driver walked over toward his truck and yelled to the boys that were standing there, to look out as he was going to back; that he noticed the plaintiff leaning against the side of the truck; that the truck backed up and the plaintiff fell to the ground near the back wheels; that the back of the truck did not strike the plaintiff but when the truck moved the plaintiff was leaning against the side and that "is how he fell."

to the boys "straight from the owner of the truck;" that the plaintiff was behind the truck at a cool ten feet of the truck when he jumped his car. A preponderance of the witness testified that the truck was standing about 20 feet north of the alley and that the driver was about even with the alley, coming from the opposite toward the truck. "at the time he said this thing, whatever it was ?" and then he walked right up and then was around the truck on the east side of it, made a circle around it and came back on the west side."

The defendant offered in evidence the two written statements, one signed by the witness Arch and the other by the witness Reid. The statement signed by Arch was to the effect that he did not see the driver of the truck chase the boys off the truck; that he saw the driver of the truck come out of the five feet and he told the boys to go away from there; that he saw the plaintiff on the truck with one hand leaning against the truck; that the truck backed up about 2 feet and the plaintiff fell and "had the wheel run over his right hand." He stated that signed by Reid was to the effect that the driver walked over toward the truck and yelled to the boys that were playing in, to look out as he was going to back; that he noticed the plaintiff leaning against the side of the truck; that the truck backed up and the side hit the plaintiff and the back wheels; that the back of the truck hit the plaintiff but when the truck moved the plaintiff was leaning against the side and that "he fell."

The only other witness in the case was the doctor who took care of the plaintiff's hand. From his testimony it appears that there was a cut across the back of the left hand, extending down through the web between the index finger and the thumb, and the cut extended across the surface of the palm of the hand or very nearly across. The bone opposite the index finger was broken and crushed at its upper end. The cut across the hand was through the skin and fascia and several of the tendons running through the fascia were severed.. These tendons control the fingers of the hand. Infection developed in the cut located in the palm of the hand but apparently did not prove serious. As the wound healed the thumb was drawn in toward the index finger. The plaintiff was taken back to the hospital where the doctor performed what he called a plastic operation so as to increase the size of the web between the thumb and the index finger and give greater freedom of movement. The doctor testified that "there was not much result from the second operation;" that the thumb was contracted and drawn in against the index finger; that ankylosis was present in the first metacarpel bone; that the thumb had very little motion in it; that there was some motion in the fingers but that the plaintiff possessed no strength in the grip; that he could close the fingers but could not "make a tight fist;" that when the plaintiff closed his hand as tight as he could, there was about an inch between the fingers and the palm of his hand; that his inability to close his hand was caused by the presence of scar tissue in the palmar fascia, and

The only other witness in the case was the doctor who took care of the injured man. In his testimony it appears that [illegible] the back of the left hand, stretching down towards the web between the index finger and the thumb, and that extended across the bottom of the palm of the hand or very nearly across. The bone opposite the index finger was broken and crushed at its junction. The cut across the hand was through the skin [illegible] of the tendons running through the fleshy parts of the tendons control the flexure of the hand. Infection developed in the cut inserted in the palm of the hand but apparently did not prove serious. As the wound healing the thumb was drawn in towards the inner finger. The injured hand was taken back to the hospital where the doctor operated and he called a muscle operation in order to increase the size of the web between the thumb and the index finger and give greater freedom of movement. The doctor testified that "there was not much result from the second operation" that the thumb was contracted and drawn in towards the index finger; that [illegible] a [illegible] mathematical zero; that [illegible] the [illegible] it; that there was some [illegible] the fingers but [illegible] plaintiff commenced to strengthen in his grip; that to bring close the fingers and so [illegible] a tight fist; that when the plaintiff opened his hand [illegible] there was about an inch between the fingers and the palm of the hand; that his inability to close the hand was caused by the presence of scar tissue in the palmar fascia, and

that, in his opinion, this condition of the hand was permanent. The testimony shows that the plaintiff was left handed.

In support of its appeal the defendant contends that the physical injuries to the plaintiff's left hand show that the accident could not have happened in the manner sought to be proved by the evidence submitted in his behalf, and therefore, that the plaintiff had failed to make out his case as charged in the declaration. In our opinion this contention is not tenable. It may not reasonably be said that the plaintiff could not have been struck and knocked over and could not have fallen in the manner he and his witnesses described and receive the injuries to his left hand, as those injuries were described by the doctor. The argument advanced in behalf of the defendant is that if the plaintiff had been knocked over in the manner described, and the truck had backed up so that the rear right wheel ran over his left hand, it would have been inevitable that the little finger side of his hand would have been injured and crushed, but as the evidence showed that that side of his hand was not hurt at all but that the injury extended across both the upper and lower sides of the hand, from the web between the thumb and index finger to a point about opposite the fourth finger, it followed, as a physical fact, that the injury could not have been received as the plaintiff and his witnesses testified it was. There is no testimony in the record showing the condition of the pavement of the street at the point where the plaintiff received his injury. It

that, in his opinion, this condition of the hand was permanent. The testimony shows that the plaintiff was left handed.

In support of the appeal the defendant contends that the physical injuries to the plaintiff's left hand show that the accident could not have happened in the manner said to be proved by the evidence submitted in his behalf, and therefore, that the plaintiff had failed to make out his case as charged in the declaration. In our opinion this contention is not tenable. It may not reasonably be said that the plaintiff could not have been struck and knocked down and could not have fallen in the manner he and his witnesses described and receive the injuries to his left hand, as these injuries were described by the doctor. The argument advanced in behalf of the defendant is that if the plaintiff had been knocked down in the manner described, and the hand had broken so that the rear right wheel ran over his left hand, it would have been inevitable that the little finger side of his hand would have been injured and crushed, but as the evidence showed that that side of his hand was not hurt at all but that the injury extended across both the upper and lower sides of the hand, from the web between the third and fourth finger to a point about opposite the fourth finger, it followed, as a physical fact, that the jury could not have been received as the plaintiff and his witnesses testified it was. There is no testimony in the record showing the condition of the roadbed at the street at the point where the plaintiff received his injuries. It

may well be that the little finger side of the plaintiff's hand was protected, either by a depression in the pavement or by the presence of some object such as a stick or stone lying on the pavement. There are several situations that may have been present so as to result in the injuries which the plaintiff received and in the manner described by him. There might be something to the point thus urged by the defendant, if there were testimony showing a perfectly smooth surface in the pavement at the point where the plaintiff was lying at the time the injuries were received. There is very little, if any, substantive testimony in the record, tending to contradict the description of the occurrence as testified to by the plaintiff and his witnesses. As pointed out by counsel for the plaintiff. the written statements signed by Mosek and Reid may not be given the effect of such testimony. At most, they may merely be given the effect of tending to show that the witnesses at one time made statements which were not in accord with the testimony given by them on the trial. The statements were proper for the jury to take into consideration, in weighing the testimony of the two witnesses involved. Much of the argument advanced in support of this point, made in behalf of the defendant goes to the question of the value of the testimony given by the companions of the plaintiff, in support of his case. That was a matter for the jury to weigh and determine. In our opinion the record is not such as to warrant this court in saying that the verdict reached by the jury is against the manifest weight of the evidence.

may well be that the little finger of the plaintiff's hand was protected, either by a glove worn by the passenger or by the presence of some object, or, as a stick or stone lying on the pavement. There are several situations that may have been present so as to result in the injuries suffered by the plaintiff received and in the manner described by him. There might be something to the point that was urged by the defendant, if there was something resembling a perfectly smooth surface in the pavement at the point where the plaintiff was lying at the time the injuries were received. There is very little, if any, corroborative testimony in the record, tending to contradict the description of the occurrence as testified to by the plaintiff and his witnesses. As pointed out by counsel for the plaintiff, the written statements signed by Joseph and Patti may not be given the weight of such testimony. At most, they may merely be given the effect of tending to show that the witnesses at one time made statements which were not in accord with the testimony given by them at the trial. The statements were proper for the jury to take into consideration, in weighing the credibility of the two witnesses involved. None of the arguments advanced in behalf of this point, made in behalf of the defendant, at most go to the question of the value of the testimony, after by the consideration of the plaintiff, in support of his case. That was a matter for the jury to weigh and determine. In our opinion the record, is not such as to warrant this court in saying that the verdict rendered by the jury is against the weight of the evidence.

The defendant further contends that the trial court erred in refusing an instruction requested by it, in which it was sought to tell the jury that if they believed from the evidence that at the time the plaintiff was injured he "was standing on or near the west curb of Elizabeth street and near the west side of the defendant's auotmobile, at a point somewhere between the front and rear wheels of said automobile, and that he was then and there leaning against or had hold of the west side of said automobile, and that while plaintiff was in that position the automobile was backed up, thereby throwing the plaintiff so that his left hand was caught in or run over by the rear right wheel of said automobile," then they should find the defendant not guilty. For the reasons we have already had occasion to refer to, we are of the opinion that this instruction was properly refused. So far as the character of the injuries to the plaintiff's left hand are concerned, we fail to see that they supported the theory outlined in this instruction any more than they did the theory involved in the plaintiff's declaration and in the testimony submitted in support of it. Furthermore, as already pointed out, there was no substantive testimony in the record, showing or tending to show that the injuries were received by the plaintiff in the manner described in this instruction. The written statements of the two boys, introduced in evidence, may not properly be given such effect. Some elements included in the instruction are not supported by any evidence at all.

Another instruction submitted by the defendant

The jury's further finding that [illegible] court erred in refusing an instruction requested by it, in which it was done so to tell the jury that if they believed from the evidence that at the time the intestate was injured he was standing on or near the west curb of Elizabeth street and near the west side of the [illegible] auto's westbound, at a point approximately [illegible] feet wheels of said automobile, and that as soon thereafter there leaning against or had hold of the rear side of said automobile, and that while standing in that position the automobile was [illegible], thereby [illegible] plaintiff so that his left hand was caught in or run over by the rear right wheel of said automobile," then they should find the defendant not guilty. For the reasons we have already had occasion to [illegible], we are of the opinion that this instruction was [illegible]. So far as the character of the injuries to the intestate's left hand are concerned, we fail to see that they are [illegible] the theory outlined in this instruction by which the theory involved in the plaintiff's declaration and in the testimony submitted in support of it. Furthermore, on already related ones, there was a substantial testimony in the record, showing or tending to show that the injuries were produced by the intestate's [illegible] in the manner indicated in the instruction. The instruction [illegible] introduced in evidence, and not merely to [illegible] effect. Some elements involved in the instruction are not supported by any evidence at all.

Another instruction submitted [illegible]

sought to advise the jury that the law does not require that a lookout be stationed on the back of a truck when being backed up, but that all that is required of the driver, is ordinary care in going forward or in backing up. It is contended that the trial court erred in refusing this instruction also. It is never error to refuse an instruction which merely contains an abstract statement of the law. Moreover, there was no such issue or contention in the case. Instructions which the trial court did give, fully covered the question of the extent of the care required of the driver of the truck.

It is urged further by the defendant that the verdict is grossly excessive in view of the injuries received by the plaintiff. We have heretofore referred to the extent of those injuries, as testified to by the doctor who took care of the plaintiff's hand. The plaintiff testified that he could not pull with his hand and also that he could not hold a knife or a fork in it. He testified that the injured hand was weaker than the other; that it was affected by changes of the weather, and that it felt colder than the other hand, at times. It would seem from the testimony of the doctor that the condition of the plaintiff's hand, as described by him, is permanent. He testified that the condition of this hand was not such as would be likely to change materially as the plaintiff grew older, although the injuries were received when he was comparatively young. That the injuries will result in a very material impairment in the use of the hand, is certain. Taking all the elements

sought to assign the jury that it was done so tragically that a lookout he maintained on the deck of a train was being broken up, but that it was in reality or the driver, in ordinary care in using his rod or in bending up. It is contended that the plaintiff's counsel in trying this instructing also. [illegible] error in refusing an instruction which accurately contains an abstract statement of the law. However, some was should issue or consideration in the case. Instructions on the legal point did give, fully covered the question of the extent of the care required of the driver of the train.

It is urged further by the defendant that the verdict is grossly excessive in view of the injuries received by the plaintiff. In this proposition reference to the extent of these injuries, as detailed to by the doctor who took care of the plaintiff's case. The plaintiff testified that he could not pull with [illegible] also that he could not lift a bushel or a load in it. He testified that the injuries were worse than the other; that he was laidoon by reason of his accident, and that he felt said to then the [illegible]. It would seem from the testimony of the doctor that the condition of the plaintiff's hand, is permanent. He testified that the condition of his hand was not such as to be likely to change materially as the plaintiff grew older, although the injuries received also be of a comparatively [illegible]. That the injuries will result in a [illegible] lessening in the use of the hand, is certain. [illegible]

involved into consideration, we are unable to say that the damages fixed by the jury are such as wouldwarrant this court in disturbing the verdict.

For the reasons stated the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

338 - 30191

493

RAFEL IVANAUSKAS,

Appellee,

v.

FRANK PAIEDA,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 660

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $150.00 recovered against him in the Municipal Court of Chicago, by the plaintiff.

By his statement of claim the plaintiff alleged that his claim was for $150, being a balance due for a "Hudson automobile car No. 90016, engine No. 84804, sold and delivered to the defendant at his special instance and request on November 18, 1923. That said defendant promised to pay the same in installments of fifty and no/100 ($50) dollars each, payable one installment in each of the months of December, 1923, January, 1924, and February, 1924. Plaintiff further states that the defendant drew up in his own hand writing and signed a promissory note, dated November 18, 1924, for one hundred fifty ($150) dollars, payable to the plaintiff in installments as above described. That though often requested, the defendant had refused to pay the same, to the damage of the plaintiff in the sum of one hundred fifty and no/100 dollars ($150). Wherefore, he

838 - 3C(3)

MAYNE IVANHAMERSON,

Respondent,

v.

FRANK PAIGNA,

Appellant.

Opinion filed Jan. 20, 1938.

MR. PRESIDING JUSTICE WILSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $1250.00 recovered against him in the Municipal Court of Chicago, by the plaintiff.

By the statement of claim the plaintiff alleges that his claim was for $1500, being a loan due for a "Hudson automobile, motor No. 90016, engine No. 8430", said and delivered to the defendant at his special instance and request on November 18, 1932. That said defendant promised to pay the same in installments of fifty and no/100 ($50.00) dollars each, payable one installment in each of the months of December, 1932, January, 1933, and February, 1934. Plaintiff further states that the defendant does so in his own hand writing and signed a promissory note, dated November 18, 1934, for one hundred fifty ($150.00) dollars, payable to the plaintiff in that illegal no more remembered. That though often requested, the defendant had refused to pay the same, to the damage of the plaintiff, in the sum of one hundred fifty and no/100 dollars ($150.). Therefore, the

brings his suit."

The sole point raised by the defendant in support of his appeal is that the statement of claim was insufficient to state a cause of action and that the trial court erred in denying the defendant's motion to strike the statement of claim.

The point contended for is without merit. In our opinion the statement would be good as a common law declaration, according to the authority cited by defendant himself. 2 Daniels on Negotiable Instruments, 5th Ed. Sec. 1199 The plaintiff alleges in his statement of claim facts from which it appears that he is the payee of the notes sued upon. Furthermore, this was an action of the fourth class in the Municipal Court of Chicago. In such an action no written pleadings are required and the case is whatever the evidence introduced, makes it. Edgerton v. C. R. I. & P. Ry. Co., 240 Ill. 311; Sexton & Co. v. English Canning & Mfg. Co., 211 Ill. App. 504; McClunn v. Gillespie, 227 Ill. App. 400. The record shows the court heard evidence, but the record does not contain it. We must assume it was sufficient to support the judgment. The statement of claim in the case at bar appraised the defendant fully as to what the claim of the plaintiff consisted of and the nature of his demand, which is sufficient to comply with the requirements of the statute. Cahill's Illinois Statutes, ch. 37, Par. 428.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

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For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ., CONCUR.

347 - 30200

49 Ma

JACOB BLOOMENTHAL, ET AL.,
Appellees,

v.

F. W. WOOLWORTH CO.,
a Corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 660

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

In their statement of claim the plaintiffs alleged that in April, 1914, one Hollender and wife leased certain premises to the defendant company, by a certain lease, copy of which was attached to the statement of claim. This lease was for a period of 10 years. The premises covered by it, included parts of two buildings, one in the front of the premises and the other in the rear. The plaintiff alleged that sometime in 1916 they acquired title to this property in fee simple and the lease in question was assigned to them in writing, and that the defendant attorned to them. They further alleged that as a part of the consideration of the letting of the premises to the defendant, the latter obligated itself to make certain repairs, sometime after May 1, 1917, and prior to the expiration of the lease, by which repairs the two buildings would be joined together. They further alleged that they often requested and demanded that the defendant make these repairs, such requests and demands being made after May 1, 1917, and prior to April 30, 1924, the date of the

847 - 2d[illegible]

JAMES MCC[illegible],

Appellee,

v.

[illegible]

Appellant.

Opinion filed Jan. 20, 1905.

expiration of the lease, but that the defendant failed and neglected to perform its obligations under the lease with reference to the repairs and failed and neglected to join the two buildings together in accordance with the provisions of the lease. The plaintiffs also alleged that the fair and reasonable cost of the work required to make the changes and repairs contemplated was, in April 1924, the sum of $5,000; that the defendant in June 1917, had acknowledged in writing its obligation to do this work but stated that it did not desire to incur the expense at that time; and that the work had never been done, wherefore, the plaintiffs brought this action to recover from the defendant the fair and reasonable cost of doing it.

The defendant company filed an affidavit of merits setting up as its only defense what amounted to a plea of res adjudicata. This contention was based on an action which the plaintiffs had brought against the defendant in December 1919, in which action the plaintiffs had also set up the failure of the defendant to make these changes and repairs which they contended the lease called for and in which action they sought to compel the defendant to pay the fair and reasonable cost of making the changes and repairs, which cost was then alleged to be $2500.

The plaintiff later filed an amended statement of claim in the case at bar, which made substantially the same allegations as the original statement, but with greater particularity. It will not be necessary to refer to those allegations in this opinion. Subsequently, the defendant filed an amend-

expiration of the lease, but when the defendant failed and neglected to perform the obligations under the lease with reference to the repairs and alterations to join the two buildings together in accordance with the provisions of the lease. The plaintiffs also alleged that the fair and reasonable cost of the work required to make the changes and repairs mentioned was, in April 1947, the sum of $8,000; that the defendant in June 1947, was acknowledged in writing the obligation to do said work but stated that it did not desire to incur the expense at that time and that the work had never been done, wherefore, the plaintiffs brought this action to recover from the defendant the fair and reasonable cost of doing it.

The defendant company filed an affidavit of merits setting up as its only defence what is stated to be a plan of **rebuilding**. This contention was based on an action which the plaintiffs had brought against its predecessor in December 1919, in which action the plaintiffs had also sued on the failure of the defendant to make those changes and repairs which they contended the lease called for and in which action they sought to compel the defendant to pay the fair and reasonable cost of making the changes and repairs, which cost was then alleged to be $3500.

The plaintiff later filed an amending statement of claim in the case at bar, which was substantially the same as that on the original statement. In this, the later pleading, it will not be necessary to refer to some allegations in this opinion. Nevertheless, the statement of claim

ment to its affidavit of merits, by adding an additional defense, namely, a denial that the fair and reasonable cost and value of the work required for the making of the repairs and improvements, in the month of April, 1924, was the sum of $5,000.

The issues joined on these pleadings were submitted to the court and the court found the issues in favor of the plaintiffs and assessed their damages at the sum of $5,000, and judgment was entered against the defendant for that amount. To reverse that judgment the defendant has perfected this appeal.

One of the contentions advanced by the defendant in support of its appeal is that the lease should be most strongly construed against the plaintiffs, they being assignees of the lessor, and that under such a construction of the various clauses in the lease, thedefendant was not obligated to make the repairs, as claimed by the plaintiffs. With reference to that contention it is sufficient to say that the defendant is not in a position to make it, in view of the pleadings. The defendant must be confined to such defenses as it chose to set up in it affidavit of merits. No such defense is there mentioned. In their statement of claim the plaintiffs alleged that under the lease the defendant was obligated to make the repairs and alterations in question sometime during the term of the lease, but not until after May 1, 1917. That contention and allegation advanced by the plaintiffs in their statement of claim was not denied by the defendant in its affidavit of merits, either as originally filed or as later amended. All material matters

meet to its efficiency of service, by giving an additional distance, namely, a trial that the fair and reasonable cost and value of the work required for the making of the repairs and improvements, in the month of April, 1924, was the sum of $3,000.

The lower jurors on these findings were submitted to the court and the court found the issue in favor of the plaintiffs and assessed their damages at the sum of $3,000, and judgment was entered against the defendant for that amount. To reverse that judgment the defendant has prefected this appeal.

One of the contentions advanced by the defendant in support of its appeal is that the issue upon which the court erroneously construed against the plaintiffs, they being managers of the lessee, had that water had a warranty of the various diseases in the lessee, whether but was not obligated to make the repairs, as claimed by the plaintiffs. With reference to that contention it is sufficient to say that the defendant is not in a position to raise it, in view of the pleadings. The defendant must be confined to such defenses as it chose to set up in its affidavit of merits. No such defense is there made. In single statement of claim the plaintiffs alleged that under the lease, the tenants was obligated to make the repairs and alterations in question according to the terms of the lease, but that until after May 1, 1923. That's contention and allegation advanced by the plaintiffs in their statement of claim was not denied by the defendant in its affidavit of merits, either as originally filed or as later amended. All material matters

alleged by the complainants in their statement of claim and not denied or traversed by the defendant in its affidavit of merits are to be taken as admitted. That being the situation, the defendant cannot be heard to raise that point now.

Another contention advanced by the defendant in support of its appeal is that the plaintiffs, although purporting to sue as assignees, did not comply with Section 18 of the Practice Act, and make the affidavit there required. As in the case of the point last referred to, so here, this defense was not interposed by the defendant's pleading in the trial court. Moreover, we are of the opinion that Section 18 has no application to the assignment of a lease. That section has to do with any chose in action, not negotiable. Where parties purchase property which is under lease and taken an assignment of the lease and the tenant attorns to them, it seems quite clear that the rights they have acquired under the assignment may not be properly described as chose in action. Barr v. Florentine Alabaster Co., 174 Ill. App. 256; Cahills Ill. Sts. Ch. 80 sec.14; 5 C.J.847, 851; 24 Cyc. 979.

The main contention advanced by the defendant in support of its appeal is that the prior action brought by the plaintiffs against the defendant, referredto by the latter in its affidavit of merits, is res adjudicata, and therefore, a complete bar to the present action. In our opinion that contention is also untenable. The plaintiffs concede that issues which the parties have formerly litigated,

alleged by the complainants in their statement of claim and not denied or traversed by the defendant in its affidavit of merits are to be taken as admitted. That being the situation, the defendants cannot be heard to raise that point now.

Another contention advanced on the defendant's behalf in support of its appeal is that the plaintiffs, although purported, to use an analogous, did not comply with section 18 of the Trades Act, and were the affidavit there required. As in the case of the motion last referred to, so here, this defence was not introduced by the defendants pleading in the trial court. However, we are of the opinion that section 18 has no application to the assignment of a lease. The section has to do with any mode in which not negotiable. Where parties purchase property which is under leases and before assignment of the lease and the tenant attorns to them, it seems quite clear that the rights they have acquired under the assignment may not be properly described as chosen in action. Mark v. Alexander [illegible] 174 III. App. 358; Phillips [illegible] 82; 24 Can. 679.

The main contention advanced by the defendants in support of its appeal is that the prior action for the by the plaintiffs against [illegible], instituted by the latter in its capacity of agents, is the [illegible], and therefore, a nullity but to the present action. In our opinion that contention is also untenable. The identity consists that issues which the parties have formally litigated,

as appears from the record in the case, and also all issues which either party in the exercise of reasonable diligence might have brought forward and had adjudicated in that cause, are barred in any subsequent action by the doctrine of res adjudicata. But it is pointed out that under the pleadings in the case at bar, it is admitted that the terms of the lease were such as to obligate the defendant to make the repairs and alterations in question at some time following May 1, 1917, and before April 30, 1924, from which it is contended that when the plaintiffs brought an action against the defendant in December 1919, seeking to recover damages by reason of the alleged failure of the defendant to make these repairs and alterations as required by the lease, they possessed no right of action in the premises, and that being the case the rendition of a judgment of nil capiat in the prior action does not bar the present action. That is a correct statement of the law. Bacon v. Schepflin, 185 Ill. 122, 129 - 130; Natl. Bond & Investment Co. v. Zakos, 230 Ill. App. 608, 613. The defendant seeks to meet this contention advanced by the plaintiffs by pointing out that, in making the contention, the plaintiffs assume that the trial court in the first suit brought by them, dismissed the suit because it was prematurely brought, whereas, the contrary is apparent, in view of the fact that the record discloses that in that prior action the court allowed the plaintiffs to amend their statement of claim several times, and that such action on the part of the trial court is inconsistent with any such view. One essential requisite to a successful plea of res adjudicata is, that the two causes of action involved were the same and

so appears from the record in the case, and also all issues which either partly in the exercise of reasonable diligence might have brought forward and had adjudicated in that cause, are barred in any subsequent action by the operative of the adjudication. But it is pointed out that under the pleadings in the case as lost, it is admitted that the terms of the lease were such as to complete the contract in such the repairs and alterations in question at some time following May 1, 1927, and prior to April 30, 1928. Plaintiff is contended that when the liability occurred in action against the defendant in February 1929, seeking to recover damages by reason of the alleged failure to the defendant to make those repairs and alterations in violation of a lease, they possession on a lease of action in the contract, and if being the same the condition of payment of all rental in the prior action does not bar the present action. That is a correct statement of the law. Mason v. Lowenstein, 148 Ill. App. 488, 489; Hall v. Lord & Thomas et al. v. Lewis, 251 Ill. 128 - 132; Hall v. Lord & Thomas et al. v. Lewis, 251 Ill. 128, 131. The statement which we have this proposition is advanced by the plaintiffs in pointing out that, in using the contract, the defendants assume that the lease is void or that the first suit brought by them, insisting the only had a right to a certain payment, whereas, the contrary is asserted in view of the fact that the second defendant, in a by prior action the court allowed the plaintiff to amend their statement of claim setting forth the lease, and that such action on the part of the trial court in incorporation with by such time, the essential xxxxxxxxx to a contractual plan of the defendants is, that the two causes of action in question are the same and

that the issues sought to be raised in the second action were properly before the court in the prior action, and passed upon. That this situation is not presented in the case at bar is clear from the fact that it is apparent on the face of the record that at the time the plaintiffs brought their prior action they, in fact, had no cause of action at all. In that situation it is immaterial what reason may have actuated the court in the prior action, in dismissing the suit and entering a judgment of nil capiat.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

that the issues sought to be raised in the instant action were properly before the court in the prior action, and passed upon. That this objection is not encountered in the case at bar is clear from the fact that at the commencement of the first of the present suits in 1910 the plaintiffs brought their prior action then, in fact, had no cause of action at all. In that action it is immaterial what reason may have actuated the court in its prior action, in dismissing the suit was entering a judgment of nil capiat.

For the foregoing reasons, the judgment of the Municipal Court is affirmed.

Affirmed.

Taylor and Gray, JJ. concur.

356 - 30309

4152

JAMES C. DAVIS, Director General of Railroads,

Appellee,

v.

THE TAMMS SILICA COMPANY, a corp.,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 661

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Director General of Railroads, brought this action against the defendant company to recover a claim for freight on a carload of Silica transported from Elco, Illinois to East St. Louis, Illinois, and from there to Bellefontaine, Ohio, and from the latter point to Chicago, amounting to $254.83. The defendant took the position that it was liable only for the freight from Elco to East St. Louis and from the latter point to Chicago direct, amounting to $73.78. This dispute was submitted to the trial court without a jury on a stipulation of facts, it being understood that the court was to enter judgment in favor of the plaintiff for either one or the other of the above amounts, depending upon whether the court agreed with the contention made by the plaintiff or with that made by the defendant. The court held in favor of the plaintiff and entered judgment against the defendant for $254.83. To reverse that judgment the defendant has perfected this appeal.

Opinion filed Jan. 30, 1922.

opinion of the court.

The plaintiff, Thomas Thomas of Baltimore, brought this action against the defendant company to recover a claim for freight on a carload of white transported from Ziegler, Illinois to East St. Louis, Illinois, which freight was collectable, Cash, and for a few cents less than the amount, amounting to $[illegible]. The issue was as to the question when it was liable only for the freight from Ziegler to East St. Louis and from the latter point to Baltimore, amounting to $[illegible]. This also was a [illegible] without a jury in a justice's court, [illegible] appeal that the court [illegible] plaintiff for either one or the other [illegible], depending upon which the [illegible] made by the plaintiff or with that made by [illegible] out. The court held in favor of [illegible] judgment against the defendant for $[illegible], to reverse that judgment the appellant [illegible] prosecution this [illegible].

The facts stipulated were to the effect that on January 7, 1920, the defendant Silica Company delivered the car in question to the Mobile & Ohio Railroad Company at Elco, Illinois, consigned to Charles R. Sargent Company at Cleveland, Ohio, the railroad company delivering to the Silica Company an appropriate bill of lading. The car was designated as Car NP-45162. It reached East St. Louis at 4 A.M. January 9, and that evening at 9:30 o'clock was delivered by the Mobile & Ohio Railroad to what is referred to as the V & C. Belt, for a switching movement to the Big Four Railroad. After being delivered to the Big Four, the car was started on its way over the latter road to Indianapolis, Indiana.

On the following afternoon, January 10, at 2:00 o'clock the Western Union telegraph operator at East St. Louis received a telegram from Tamms, Illinois, addressed to the agent of the Mobile & Ohio Railroad at East St.Louis, reading: "Hold Northern Pacific forty-five one sixty two for instructions. Tamms Silica Co." This telegram was relayed by the Western Union to the Mobile & Ohio Company operator at 3:46 P.M. on the same afternoon, January 10, and it was delivered to the chief clerk of the inbound carload freight department of the railroad company at 4:40 P.M., January 10, which was Saturday. On Monday morning, January 12, in the morning mail, the Mobile & Ohio Railroad Company received a letter from the defendant enclosing the bill of lading covering this shipment and requesting it to "reconsign this car to th following address, 'Tamms Silica Co.% Tookers Warehouse % Erie Delivery - Chicago, Illinois. * * * In the event this car

The facts originated when, it is alleged that on January 7, 1970, the defendant [illegible] delivered the car in question to the Mobile & Ohio Railroad Company at Elco, Illinois, consigned to [illegible], Newport Beach at Cleveland, Ohio, the railroad company filletting to the Illinois Company an accurate bill of lading. The car was designated as car [illegible]. It reached East St. Louis at 4 A.M. January 8, and that evening at 8:30 o'clock was delivered by the Mobile & Ohio railroad to what is referred to as the Y & O. Rail, for a switching movement to the big Four Railroad. After being delivered to the Big Four, the car was stored on the top over the Illinois road in Indianapolis, Indiana.

On the following afternoon, January 9, at [illegible] o'clock the western union telegraph operator at [illegible] Mobile received a telegram from Elmer, Illinois, addressed to the agent of the Mobile & Ohio [illegible], reading: "Big Mother Mobile Forty-Five has ship the instructions. Terms Bills on." The telegram was relayed by the western union to the Mobile & Ohio [illegible] at 3:40 P.M. on the same afternoon, January 9. [illegible] delivered to the order clerk of the Illinois Central freight department of the railroad company at [illegible], which was January [illegible]. On [illegible], January 10, the morning mail, the Mobile & Ohio [illegible] received a letter from the defendant [illegible] following this statement: "I received a [illegible] following notice, 'Terms Bills [illegible] delivery - Central, Illinois, [illegible] car of this [illegible]

has left your lines, please be kind enough to handle it with proper officials so that it will go into Chicago as requested above." At 11:45 that morning, after receiving this letter, the agent of the Mobile & Ohio Railroad sent a telegram to the agent of the Big Four Railroad at East St. Louis, requesting him to intercept the car in question and divert it, giving the directions which had been received in the letter from the defendant. At the same time, this agent advised the defendant by wire that the car had been delivered to the Big Four on January 9, and that he had "Wired connections to divert." When this telegram from the agent of the Mobile & Ohio Railroad reached the agent of the Big Four, the car had left East St. Louis for Indianapolis. The agent of the Big Four wired the agent at Indianapolis to divert the car as per the instructions which were forwarded. This telegram was received by the agent of the Big Four at Indianapolis about 12 hours after the car had arrived there and been sent on its way toward Cleveland. As soon as the agent at Indianapolis received the telegram referred to, he, in turn, wired the agent at Bellefontaine, Ohio, to divert the car to Chicago. This telegram was sent at 5:00 P.M. on January 13. The car was forwarded from Bellefontaine at 3:00 o'clock on the following morning, January 14, and was not diverted until it arrived at the railroad yards at Cleveland on January 15. It is admitted by the defendant that the instructions from the railroad agent at Indianapolis were placed in time to accomplish the diversion at Bellefontaine, consequently the plaintiff makes no claim

has left your lines, please be kind enough to handle it with proper officials so that it will go into transit as requested above." As it did not contain, after receiving this letter, the agent of the Ohio & Ohio Railroad sent a telegram to the agent at the big four Railroad at East St. Louis, requesting him to intercept the car in question and divert it, giving the directions which had been received in the letter from the Ontario. At the same time, this agent advised the consignee by wire that the car had been delivered to the big four on January 8, and that he had "fixed connections to divert." Upon this telegram from the agent of the Ohio & Ohio Railroad reached the agent of the big four, the car had left East St. Louis for Indianapolis. The agent of the big four wired the agent at Indianapolis to divert the car as per the instructions which were forwarded. This telegram was received by the agent of the big four at Indianapolis about 12 hours after the car had arrived there and been sent on its way toward Cleveland. As soon as the agent at Indianapolis received the telegram referred to, he, in turn, wired the agent at Bellefontaine, Ohio, to divert the car to Chicago. This telegram was sent at 8:30 a.m. on January 12. The car was forwarded from Bellefontaine at 2:00 o'clock on the following morning, January 14, and was not diverted until it arrived at the railroad yards at Cleveland on January 16. It is admitted by the defendant that the instructions from the railroad agent at Indianapolis were placed in time to accomplish the diversion at Bellefontaine, consequently the mistake must be chargeable

for the freight from that point to Cleveland and then to Chicago, but limits its claim to the freight from Elco, Illinois, to Bellefontaine and from there to Chicago.

As stated by counsel for the defendant in the brief filed in this court, the chief contention in this case has to do with the construction to be given the telegram sent by the defendant on January 10, wherein it requested the Mobile & Ohio Railroad Company to hold the car for further instructions. It is the defendant's contention that the railroad was negligent in failing to comply with the request in that telegram and to accomplish the diversion of the car at East St. Louis. Counsel say in their brief filed in this court that "when the agent of the Mobile & Ohio Railroad waited for forty-three hours after the telegram was delivered to him requesting him to hold the car for further instructions, that, beyond any question, constituted negligence * * * If the agent, had followed the instructions in the telegram, located the car and held it, the diversion would have been accomplished at East St. Louis, and this controversy would not have arisen."

In our opinion, the contention made is not tenable. When the telegram sent by the defendant on Saturday afternoon, January 10, reached the agent of the Mobile & Ohio Railroad at East St. Louis that afternoon at twenty minutes to five, the car of Silica had then been out of the possession of that railroad for over 18 hours, it having been delivered by them to the switching line for transfer, the previous

for the freight from that point to Cleveland and then to Chicago, but limits its claim to the freight from Elgin, Illinois, to Collinsville and from there to Chicago.

As stated by counsel for the defendant in the brief filed in this court, the only contention in this case has to do with the construction to be given the language used by the defendant on January 17, wherein it requested the mobile & Ohio railroad company to hold a car for further instructions. It is the defendant's contention that the railroad was negligent in failing to comply with the request in that telegram and in accomplishing the diversion of the car at East St. Louis. Counsel say in their brief filed in this court that "when the agent of the Mobile & Ohio Railroad waited for forty-three hours after the telegram was delivered to him requesting him to hold the car for further instructions, that, beyond any question, constituted negligence . . . " If the agent, had followed the instructions in the telegram, looked the car and held it, the diversion would have been accomplished at East St. Louis, and this controversy [illegible] arisen."

In our opinion, the contention [illegible] a mistake. When the telegram came to the defendant on Saturday afternoon, January 17, requesting the agent at the Mobile & Ohio Railroad at East St. Louis that a carload of [illegible] to Tiro, the car was still hot then [illegible] out of the possession of that railroad for over 24 hours, it having been delivered by them to the switching line the previous, the previous

evening at 9:30. Moreover, the telegram was too indefinite to enable the agent to take prompt and intelligent action. It did not state who the consignor of the shipment was; who the consignee was; where the shipment had originated, or to what point it was consigned. It was impossible for the agent to know from the telegram whether the car had at that time reached East St. Louis, or if not, when it might reasonably be expected. In our opinion, negligence may not reasonably be imputed to the railroad because no action was taken until the following Monday morning, when it received a letter enclosing the bill of lading which gave the full information. The stipulation of facts is to the effect that this letter was received about 8:30 on Monday morning. Three hours later a telegram was sent to the agent of the railroad to which this car had been delivered on the Friday evening previous, requesting that agent to intercept this car and divert it to Chicago. By its own letter the defendant shows that it appreciated the fact that its effort to overtake this car might not prove successful until the car had gone beyond East St. Louis, because in that letter the defendant said to the agent of the Mobile & Ohio Railroad Company: "In the event this car has left your lines, please be kind enough to handle with proper officials so that it will go into Chicago as requested above."

In our opinion, the stipulation contains such facts as to show that the agent of the railroad to which the plaintiff's requests were forwarded, made every effort that could reasonably be required and within a reasonable time after getting the necessary information, to comply

evening at 8:30. Moreover, the telegram was too indefinite to enable the agent to take prompt and intelligent action. It did not state who the consignor of the shipment was; who the consignee was; where the shipment had originated, or to what point it was consigned. It was impossible for him. agent to know from the telegram whether the car had at that time reached Lost ..., Iowa, or if not, when it might reasonably be expected. In our opinion, negligence may not reasonably be imputed to the railroad because no action was taken until the following Monday morning, when it received a letter enclosing the bill of lading which gave the full information. The explanation of facts is to the effect that this letter was received about 8:30 on Monday morning. There bears letter a telegram was sent to the agent of the railroad in which this car had been mentioned on the Friday evening previous, requesting that agent to immediately this car and advise it to Chicago. In its own letter the defendant shows that it appropriated the fact that its efforts to overtake this car might not prove successful until the car had gone beyond Lost ..., Iowa, but was of that letter the defendant said to the agent of the Illinois & Ohio Railroad Company: "In the event this car has left your lines, please be kind enough to forward it to our officials so that it will go into Chicago as mentioned above."

In our opinion, the evidence in question does tends to show that the agent of the railroad to which the plaintiff's complaint was directed, had every opportunity that could reasonably be required and within a reasonable time after getting the necessary information, to speedy

with the diversion order forwarded by the defendant. Some other questions of law are referred to in the briefs, which we do not consider material to a decision of this case, and we shall, therefore, not refer to them here.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

with the diversion order forwarded by the Gedney court. Some other questions of law are referred to in the briefs, which we do not consider material to a decision of this case, and we shall, therefore, not refer to them here.

For the reasons stated the judgment of the municipal Court is affirmed.

MR. JUSTICE FARMER.

TAYLOR AND O'CONNOR, J.J., DISSENT.

86718

365 - 30218

MAX ASTRAHAN,

Appellee,

v.

DAVID SPITZ,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 661

Opinion filed Jan. 20, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Spitz, seeks to reverse a judgment for $45.00, recovered against him in the Municipal Court of Chicago by the plaintiff Astrahan.

The plaintiff had delivered a suit of clothes to the defendant to be cleaned, and when it was returned the coat was burned. The testimony shows that the defendant did not have facilities for doing cleaning in his own shop and he sent the suit to the Star Cleaners & Dyers to be cleaned. One Roth testified that he was the manager of the Star Cleaners & Dyers which concern had been in the business of cleaning and dyeing clothes for over fifteen years; that his firm received the plaintiff's suit from the defendant in September, 1924, and during the process of cleaning, while it was in the dry cleaning machine, an explosion occurred and the plaintiff's suit, together with other clothes in the machine at the time, was burned and damaged. He testified that he was there at the time of the explosion but that he did not know what caused it; that it was a mystery; that the machine used by his firm was the same kind as that used by all such establish-

MAX ARTMAN,

Appellee,

v.

DAVID BRITE,

Appellant.

Opinion filed Jan. 20, 1928.

Mr. PRESIDING JUSTICE DUNN delivered the opinion of the court.

By this appeal the defendant, Brite, seeks to reverse a judgment for $48.00, recovered against him in the Municipal Court of Chicago by the plaintiff Artman.

The plaintiff has delivered a suit of clothes to the defendant to be cleaned, and when it was returned the cost was burned. The testimony shows that the defendant did not have facilities for doing cleaning in his own shop and he sent the suit to the Eber Cleaners & Dyers to be cleaned. The Eber Cleaners & Dyers is the place where the manager of the Eber Cleaners & Dyers with whom had been in the business of the cleaning and dyeing clothes for over fifteen years; that in fact removed the stains with a cut from the department in Washington, and during the process of cleaning, while it was in the dry cleaning machine, an explosion occurred and the plaintiff's suit, together with other clothes in the machine at the time, was burned and damaged. He testified that he was there at the time of the explosion but does not know what caused it; that it was a mystery; that the machine was by his firm was the same kind as that used by all such establishments

ments in the City of Chicago, and that the process employed was the most approved and up-to-date process for dry cleaning purposes; and that the machine was in good condition at the time of the explosion.

We have recently had occasion to consider a similar case involving the same cleaning and dyeing establishment. There a suit of clothes given to the Star Cleaners & Dyers about six months prior to the occurrence involved in the the case at bar, was destroyed when a similar explosion took place. In that case the same witness, Roth, the manager of that establishment, gave substantially the same testimony. There also, he referred to the explosion that had taken place, as a "mystery". Although there is some more to Roth's testimony in the case at bar than there was in theother case referred to, in that here Roth testified that the machine was in good condition, we are of the opinion that there is no substantial difference between the two cases. The title of the case referred to is, Sheets v. Star Cleaners & Dyers, et al, Illinois Appellate Court, First District. case No. 39850, Opinion filed October 28, 1925, not yet reported. As in that case, so in the case at bar, the testimony submitted by the plaintiff made out a *prima facie* case of negligence against the defendant.

Counsel for the defendant call our attention to a number of cases, holding that where a bailee shows that the article bailed was lost, damaged or destroyed by theft, fire or other accident, the plaintiff cannot recover without showing that such theft, fire or accident was due to the negligence of the bailee. The same cases were relied upon by the

works in the city of Chicago, and that the process employed was the most improved and economical process for dry cleaning purposes; and that the cleaning was in good condition at the time of the collision.

We have carefully and carefully to consider a similar case for trying the case cleaning and drying establishment. There a suit of clothes given to the then claimants a year about six months prior to the occurrence involved in the case at bar, was destroyed when a similar explosion took place. In that case the main witness, Mrs. Sue manager of that establishment, gave substantially the same testimony. There also, he referred to the explosion that had taken place, as a "mystery". Although there is some more to Potts's testimony in the case - but then there was in Chrysler's case referred to, in that case Mrs Potts testified that the machine was in good condition, - - - - the opinion that there is no substantial difference between the two cases. The rule of the case referred to is, Phoenix v. Pacific Cleaning & Dyeing, 21 Ill. Illinois Appel. Court, First district, page 70, 1886, Judgment filed October 16, 1886, not yet reported. As in that case, so in the case at bar, the testimony adduced by the claimant's side was a prima facie case of negligence on the part the defendant.

Counsel for defendant's (all per [illegible]) is a number of cases, showing that where a bailee when left the article bailed was lost, damaged or destroyed by theft, fire or other contents, the bailee's mere showing without showing how such theft, fire or collision was due to the negligence of the bailee. The cases were cited upon by the

same counsel in the Sheets case, supra. In the opinion filed in that case we pointed out that those cases were not in point because there the forces causing the destruction of the property were not within the control of the bailee, while here, as in the Sheets case, the machine in question was under the management and control of the bailee at the time the damage was done and the loss suffered. Moreover, we have had occasion to hold that the correct rule is not as contended by counsel for the defendant. Where a bailor makes out a prima facie case as to negligence in an action against the bailee, such prima facie case is not overcome merely by a showing on the part of the bailee to the effect that the goods bailed had been lost through theft or fire, but in order to overcome such prima facie case the bailee is obliged to show further that such loss was not caused by his negligence or that it occurred in spite of the exercise on his part of a degree of care appropriate to the circumstances surrounding the bailment. Clemenson, Admrx. v. Whitney, Illinois Appellate Court, First District, case No. 29811, opinion filed October 28, 1925, not yet reported.

In our opinion the defendant in the case at bar did not prove sufficient facts to overcome the prima facie case made out by the plaintiff's evidence. No contention is made that the only duty of the defendant was to use reasonable care in selecting a person or concern to do the cleaning, and that if he did, he would not be liable.

case covered in the Ganzie case, supra. In the opinion filed in that case we pointed out that those cases were not in point because here the forces causing the conversion of the property were not within the control of the bailee, while here, as in the Ganzie case, the evidence in question was under the management and control of the bailee at the time the damage was done and he has suffered. Moreover, we have had occasion to hold that the carrier who is not as contended a bailee for the defendant. Where a bailee makes out a prima facie case as to negligence in an action against the bailee, such prima facie case is not overcome merely by a showing on the part of the bailee to the effect that the goods bailed had been lost through theft at time, but in order to overcome such prima facie case the bailee is obliged to show further that such loss was not caused by his negligence or that it occurred in spite of the exercise on his part of a degree of care appertaining to the circumstances surrounding the bailment. Gibbs, supra, v. Gibbs, 210 Ala. 210, 97 So. 834, first syllabus, case No. 6881, opinion filed October 26, 1923, not yet reported.

In our opinion the order of the court in the case at bar did not prove sufficient facts to overcome the prima facie case made out by the plaintiff's evidence. We conclude it is made that the only duty of the defendant was to use reasonable care in selecting a person to operate it on the premises, and that if he did, he could not be liable.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

313 - 30168

CHARLES J. FORSBERG,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

240 I.A. 661

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On October 20, 1919, plaintiff was appointed, by the Board of Education of Chicago, Business Manager of the Board for a term of four years at a salary of $10,000.00 per year. Upon being appointed, he entered upon the discharge of his duties and continued in the performance of them until September 15, 1922, when at his request, he was given a leave of absence and he has performed no services as business manager or otherwise since that date. He was paid his salary up until the time he took the leave of absence and has been paid nothing since that time. He has brought this suit to recover $11,041.77, which he claims was due him as salary from the time he took the leave of absence in September, 1922, until the expiration of the period of time for which he was appointed business manager, October 20, 1923. The case was tried before the court without a jury and there was a finding and judgment in defendant's favor and plaintiff appeals.

313 - 2016

CHARLES J. PROPERSO,

Appellant,

v.

BOARD OF EDUCATION OF THE
CITY OF CHICAGO,

Appellee.

Opinion filed Jan. 20, 1928.

MR. JUSTICE [illegible] delivered the opinion of the court.

On October 26, 1925, plaintiff was dismissed, by the Board of Education of the City of Chicago, [illegible] of the Board from a term in this [illegible] of the [illegible] per year. This notice [illegible] the discharge of the [illegible] additional in the proceedings of that [illegible] September 16, 1925, [illegible] the manner, he was given a leave of absence [illegible] authorized to serve [illegible] or [illegible] or [illegible] He was paid his salary up until the time [illegible] of absence and has been [illegible] since [illegible] time. This bill was filed to recover [illegible] was due him as salary from the time [illegible] absence in September, 1925, until the [illegible] period of time [illegible] October 30, 1926. The case was tried before [illegible] without a jury and there was a judgment [illegible] defendant's favor [illegible] in [illegible].

It is plaintiff's contention that during the period beginning October 20, 1919, and ending October 20, 1923, he was the legal business manager of the Board of Education - that he held the legal title to this office and therefore, was entitled to the salary, since he had not resigned or abandoned his office; that under the statute, Sec. 129, Chap. 122 of the revised statutes he could only be removed as business manager for cause by a vote of the members of the Board of Education, after charges had been filed against him and after a hearing; that no charges were ever made against him, and therefore, he held title to the office during the four years period for which he was elected.

The record discloses that no charges were ever made against plaintiff by the Board of Education, but on September 6, 1922, he wrote a letter to the President of the Board of Education, stating that the grand jury of Cook County had returned several indictments against him; that he was absolutely innocent of any wrong doing and that this would appear upon the trial of those indictments. The letter then went on to say "I feel that I should be given a leave of absence from my official duties to have an opportunity to prepare for presenting all the facts to a jury of twelve impartial men and be fully acquitted of the unjust charge which has been laid against me.

"For these reasons I respectfully ask that you grant me a leave of absence at once."

It further appears that this letter was brought

It is plaintiff's contention that during the period beginning October 30, 1939, and ending October 30, 1942, he was the legal business manager of the Board of Education - that he held the legal title to the office and therefore, was entitled to the salary, since he had not resigned or abandoned his office; that under the statute, Sec. 139, Chap. 122 of the revised statutes he could only be removed as business manager for cause by a vote of the members of his board of education, after charges had been filed against him and after a hearing; that no charges were ever made against him, and so return, he held title to the office during the four years period for which he was elected.

The second disclosure that he should have been made against plaintiff by the board of education, but on September 8, 1942, he wrote a letter to the President of the Board of Education, stating that the grand jury of Cook County had returned several indictments against him; that he was absolutely innocent of any wrong doing and that this would appear upon the trial of those indictments. The letter then went on to say "I feel that I should be given a leave of absence from my official duties to have an opportunity to prepare for prosecution." It then "even to a very of twelve impartial men and be fully acquitted of the unjust charge which has been laid against me.

"For these reasons I respectfully request an leave of absence as stated."

It further appears that this letter was brought

before the Board on September 13, 1922, with the recommendation of the President of the Board that the request be granted. The recommendation of the President was concurred in at that time. The evidence further shows, without contradiction, that plaintiff performed no services for the Board of Education as business manager or otherwise, after that date; that he made no claim at any time for salary after that date until September 17, 1923, when he wrote the Board of Education a letter in which he stated: "I respectfully call your attention to the fact that I have not received my salary as business manager of the Board of Education for the period from September 7, 1922, to the expiration of my term of office May 28, 1923."

On September 13, 1922, the record shows that plaintiff's request for leave of absence was granted and it further shows that December 13th following, the Board elected "J. A. Gilford as acting business manager at the present salary during the absence of business manager, Mr. Forsberg;" that on January 14, 1923, the acting business manager, Gilford, wrote the president of the Board, stating that on account of the state of his health and under the advice of his physician, he desired a leave of absence for a period of six months from February 16, 1923, and recommended that John E. Byrnes, who had been with the Board of Education some twenty-six years, serving as chief clerk in the business manager's office, be appointed his successor in his absence as assistant business manager and that his salary be fixed at $6,000.00 per annum, and that the duties heretofore performed by me be imposed upon him." On that

before the board on September 11, 1980, with the recommendation of the President of the board that it be removed be granted. The recommendation of the board on was concurred in as this date. The evidence presented, which was uncontradicted, that disciplinary proceedings for the board of Education as continued remedy of otherwise, after that date; that he made no claim on any time for military after that date until September 19, 1980, when he wrote the Board of Education a letter in which he stated: "I respectfully call your attention to the fact that I have not received my military or business wages of the period of Education for the period from September 7, 1980, to the expiration of my term of office July 15, 1980."

On September 19, 1980, the records show that plaintiff requested for leave of absence for greater and it further shows that December 11th following, the board elected Mr. A. Gilford as acting business manager at the president military during the absence of Mr. Fordham." Mr. Fordham, that on January 21, 1981, the acting business manager, Gilford, wrote the President of the Board, stating that on account of the state of his health he under the advice of his physician, he desired a leave of absence for a period of six months from February 16, 1981, and requested that upon [illegible], he be reinstated to the position of Business Manager's office, [illegible] his absence as Assistant Business Manager [illegible] salary be fixed at [illegible]. [illegible] the Board therefore passed and by [illegible] on his. The first

date the Board of Education granted Gilford's request for a leave of absence and on February 14, 1923, it was ordered by the Board that Gilford be paid at the rate of $8,000.00 per annum during the time he was on leave of absence and on the same date it was ordered by the Board that Louis F. Wilk be made acting business manager of the Board of Education, owing to the leave of absence of Gilford. On June 8, 1923, the President of the Board of Education presented Wilk's resignation as Secretary of the Board and as acting business manager. The resignation to become effective June 21, 1923. The resignation was accepted and John E. Byrnes was appointed acting business manager to succeed Wilk at a salary of $10,000.00 per annum effective June 21, 1923. The record of the Board further discloses that on February 13, 1924, it was stated that it appeared that the Board had for sometime delayed filling the position of business manager and that Byrnes had been acting business manager. Thereupon Byrnes was elected business manager for a period of four years at a salary of $12,000.00 per year. The record further shows for the year 1922-1923 there was appropriated for the business manager's department more than $32,000.00, $10,000.00 of which was for the manager's salary, and that during that year more than $28,000.00 of the appropriation was expended. It further appears that plaintiff was tried on the charges made against him in the Criminal Court and on June 23, 1923, was acquitted of all the charges.

date the board of transportation commissioners granted a leave of absence on January 14, 1973, it was ordered by the board that Allford be paid at the rate of $8,000.00 per annum during the time he was on leave of absence and on the date upon it was ordered by the board that Louis F. Ellis be were acting transportation manager of the board of transportation, during the time of absence of Allford. On June 6, 1973, the president of the board of transportation notified Allford's replacement as manager of the board and as acting assistant manager, the resignation to become effective June 21, 1973. The resignation was accepted and John A. Byrne was appointed acting business manager to succeed Ellis at a salary of $10,000.00 per annum effective June 21, 1973. The record of the board further discloses that on February 15, 1974, it was ordered that it appointed John Ellis as acting for operating delayed filling the position of business manager and that Byrne has been acting business manager. [illegible] Byrne was elected [illegible] for a term of two years at a salary of $12,[illegible] per year. The board further above for the year 1974-1975 [illegible] printed for the business manager [illegible] $22,000.00, $10,000.00 of which was for the manager's salary, and that during that year more than $[illegible] of the appropriation was [illegible]. In further answer and pleadings was filed on [illegible] June 24, 1974, was sustained by the Criminal Court and on June 24, 1974, was sustained by the [illegible].

Plaintiff in support of his contention that since he held a legal title to the office, he was also entitled to the salary, cites the case of People v. Coffin, 279 Ill. 401 and other cases. In that case it was held that the legal right to an office carries with it the right to the salary which is incident to the title to the office and not to its occupation "and where a de jure officer of a municipality has been wrongfully deprived of his office", he may maintain an action of mandamus to compel his re-instatement and the payment of his salary. It is clear that this case does not sustain plaintiff's contention that he is entitled to the salary which he claimed, because in the instant case no claim is made that the Board of Education wrongfully deprived plaintiff of his office. On the contrary, he was granted a leave of absence at his own request and during the time he was absent on leave, he made no complaint that he was not receiving his salary. The first intimation that he was claiming salary for this period of time is shown in his letter dated September 17, 1923. Not only did plaintiff fail to make any demand or claim for his salary during the period of his leave of absence but, although his trial in the Criminal Court was disposed of in July, he did not return to his position with the Board of Education or offer to resume his duties as business manager of the Board, notwithstanding the fact his term of office for which he now claims his salary did not expire until the following October. This shows a constructive if not an actual abandonment of his office.

Plaintiff in support of his contention that since he held a legal title to the office, he was also entitled to the salary, cites the case of Lewis v. Quinn, 272 Ill. 401 and other cases. In that case it was held that the legal right to an office carries with it the right to the salary which is incident to the title to the office and not to its compensation "and where a de jure officer of a municipality has been wrongfully deprived of his office", he may maintain an action of assumpsit to compel his re-instatement and the payment of his salary. It is clear that this case does not sustain plaintiff's contention that he is entitled to the salary which he claimed, because in the instant case no claim is made that the Board of Education wrongfully deprived plaintiff of his office. As the contrary, he was granted a leave of absence at his own request and during the time he was absent on leave, he made no complaint that he was not receiving his salary. The first intimation that he was claiming salary for this period of time is shown in his letter dated September 17, 1933. Not only did plaintiff fail to make any demand or claim for his salary during the period of his leave of absence but, although his total in the criminal court was discovered at its duly, he did not return to the position with the Board of Education or offer to resume his duties as business manager of the Board, notwithstanding she kept his name of office for which he now claims the salary did not expire until the 2. among October. This shows a constructive if not an actual abandonment of his office.

Plaintiff further contends that he was entitled to his salary because the record discloses that an appropriation was made for the office and the salary thus appropriated was not paid to any other person during his absence. Counsel for the Board of Education made no reply to this contention but an examination of the evidence, which we have above set forth, discloses that other persons performed plaintiff's duties, during plaintiff's absence and were paid the salary, because it appears that of the $32,000.00 appropriated each year, morethan $26,000.00 had been expended. We think it clear that plaintiff having been granted a leave of absence, at his own request, and having performed no services after he was granted a leave of absence and other persons having been appointed by the Board of Education toperform the services required of the business manager, and those persons having been paid in good faith practically all of the salary appropriated, plaintiff cannot recover. No authority has been cited and we know of none that would warrant the recovery under the facts as shown in this case.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Plaintiff further contends that he was entitled to his salary because the record discloses that an appropriation was made for the office and the salary thus appropriated was not paid to any other person during his absence. Counsel for the board of education made no reply to this contention but an examination of the evidence, which we have above set forth, discloses that other persons performed plaintiff's duties, during plaintiff's absence and were paid the salary, because it appears that of the $38,000.00 appropriated each year, approximately $8,000.00 had been expended. We think it clear that plaintiff having been granted a leave of absence, at his own request, and having performed no duties after he was granted a leave of absence and other persons having been employed by the board of education to perform the services vacated by the plaintiff, and these persons having been paid in good faith practically all of the salary appropriated, plaintiff cannot recover. No authority has been cited and we know of none that would warrant the recovery under the facts as shown in this case.

The judgment of the Superior Court of Cook County is affirmed.

JUSTICE.

THOMPSON, P.J. and TRUMBULL, J. concur.

319 - 30172

496

KENNETH SHELDON, a minor,
by his next friend,

Appellee,

v.

JOSEPH G. SEREIKAS,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

240 I.A. 661

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff, a boy about six years of age, by his next friend, brought suit against the defendant to recover damages for personal injuries claimed to have been occasioned by plaintiff being struck and injured by defendant's automobile. There was a verdict and judgment in plaintiff's favor for $2500.00 and the defendant appeals.

The record discloses that about two o'clock on Sunday afternoon of March 21, 1920, plaintiff, who was crossing Milwaukee avenue, was struck and injured by defendant's automobile, which was being driven in a northwesterly direction on Milwaukee avenue at the intersection of Milwaukee avenue and Central Park avenue, Chicago, Milwaukee avenue at this point runs in a northwesterly and southeasterly direction and Central Park avenue, a north and south street, intersects it. Plaintiff's theory of the case, as shown by the evidence, was that he was at the northeast corner of the intersection, which was a business section; that he started south across

Milwaukee avenue and when he had reached the first street car track in Milwaukee avenue, he was struck by defendant's automobile which was driven in a northwesterly direction along that street car track. On the other hand, the defendant's theory was that plaintiff was at the southeast corner of the intersection and that he started across Central Park avenue in a northwesterly direction at the cross-walk on the southwestern side of Milwaukee avenue; that when he reached a point about the center of Central Park avenue, he suddenly turned toward the north passing behind a street car, which was proceeding southeasterly in Milwaukee avenue, and directly in front of defendant's automobile so that when plaintiff came into view behind the street car, it was impossible for the defendant to stop the automobile in time to prevent injuring plaintiff.

The defendant contends (1) that the verdict is against the manifest weight of the evidence (2); that it is excessive and (3) that the court erred in giving an instruction at plaintiff's request.

1. A careful examination of all the evidence in the record shows that it is in irreconcilable conflict. There is considerable confusion in the record as to how the accident occurred and this has not been clarified by argument of counsel. Witnesses for plaintiff gave testimony to the effect that plaintiff was at the northeast corner of the intersection of the two streets and that he started south across Milwaukee avenue at the east cross-

Milwaukee avenue and when he had reached the [illegible] car track in Milwaukee avenue, he was struck by [illegible]ski's automobile which was driven in a northwesterly direction along that street car track. On the other hand, the defendant's theory was that plaintiff was at the southwest corner of the intersection and that he started across Western Park avenue in a northwesterly direction at the crossewalk on the [illegible] side of Milwaukee avenue; that when he reached a point about the center of Western Park avenue, he suddenly turned toward the north passing behind a street car, which was proceeding northwesterly in Milwaukee avenue, and immediately in front of defendant's automobile so that when plaintiff came into view behind the street car, it was impossible for the defendant to stop the automobile in time to prevent injuring plaintiff.

The latter two contends (1) that the verdict is against the manifest weight of the evidence (2) that it is excessive and (3) that the court erred in giving an instruction at plaintiff's request.

1. A careful examination of all the evidence in the record shows that it is in irreconcilable conflict. There is considerable conflict in the evidence as to the accident occurred and this has not been clarified by argument of counsel. Either as the plaintiff's witnesses testify to the effect that he was hit at the northeast corner of the intersection of [illegible] or as the defendant testified south across Milwaukee avenue at the west [illegible]

walk of Central Park avenue; that when plaintiff reached the first street car track in Milwaukee avenue, he was struck by defendant's automobile which was being driven northwesterly in that street car track; that the defendant's car was traveling from fifteen to twenty-five miles per hour and that there was no other traffic in the street that would interfere with the defendant's view of plaintiff.

John R. Bettis called by the defendant testified that he was standing at the southeast corner of the intersection and that plaintiff was at the southeast corner; that plaintiff started across Central Park avenue toward the witness and when he had reached a point some where near the center of Central Park avenue on the southwesterly cross-walk, he suddenly turned to the north in front of defendant's approaching automobile; that there was no other traffic in the street to obstruct the witness' view or view of the driver of the automobile from seeing the boy; that he did not remember whether there were any street cars passing at the time; that the boy suddenly turned and ran directly in the path of the automobile and was struck and injured. The defendant and another man who were riding in the automobile testified, and their testimony is to the effect, that the automobile was being driven northwesterly in the street car track; that as it approached the east side of Central Park avenue, its speed was slackened on account of another automobile being driven south in Central Park avenue, passed in front of the defendant's automobile and turned southeasterly down Milwaukee avenue; that a street car which was being driven southeasterly down Milwaukee

walk of Central Park avenue; that said plaintiff received the first shock our track in alleged accident, he was struck by defendant's automobile which was being driven northwestwardly in that street our track; that defendant's car was travelling from fifteen to twenty-five miles per hour and that there was no other traffic in the street that would interfere with the driver's view of plaintiff.

John E. Smith owned by the defendant testified that he was standing on the northwest corner of the intersection and that plaintiff was on the southeast corner; that plaintiff started across Central Park Avenue towards the witness and when he had reached a point some three feet the center of Central Park avenue on the northwestwardly cross-walk, he suddenly turned to the north in front of defendant's approaching automobile; that there was no other traffic in the street to obstruct the chauffeur's view or view of the driver of the automobile from seeing the car; that he did not remember [illegible] there was any other car passing at the time; [illegible] the automobile turned in the north of the [illegible] and struck and knocked down and injured. The defendant and another witness were [illegible] in the automobile testified, and in his testimony in the effect, that the automobile was being driven northwestwardly the street our track; that [illegible] the east of the Central Park avenue, the car was observed on [illegible] of another automobile coming driven south [illegible] Park avenue, passed in front of the defendant's automobile [illegible] turned southeasterly [illegible] avenue; that a street car which was being driven southwestwardly [illegible]

avenue was immediately behind this automobile when it turned southeasterly in Milwaukee avenue and that the plaintiff ran out from behind the street car in front of defendant's automobile when it was but about five or eight feet from him, so that it was impossible to stop the automobile in time to prevent striking the boy. There is other testimony in the record which would tend to affect the credibility of several of the witnesses so that the question to be determined by the jury depended upon their viewof the credibility of the witnesses. They were in much better position, as was the learned trial judge, to determine the truth of the matter in controversy than we are. We have but the printed page before us. The jury found in the plaintiff's favor and after a careful consideration of all the evidence in the record, we are unable to say that the finding is against the manifest weight of the evidence. In these circumstances, we are not authorized to disturb the judgment.

2. The defendant further contends that the verdict is excessive in that the evidence discloses that plaintiff's injuries were but slight. The evidence shows that the boy was knocked down and rendered unconscious; that there were contusions about his face and head; that he received surgical and medical attention, a number of stitches being required to reduce a cut which plaintiff sustained in his right cheek; that there was also a depression and fracture of the bones of both tables of the left side of the

avenue was [illegible] with automobile [illegible]. It turned accidentally in [illegible] avenue and that the plaintiff was out from behind the area [illegible] of defendant's automobile when [illegible] or eight feet from him, [illegible] stop the automobile in time to prevent striking the boy. There is other testimony in the record which would tend to affect the credibility or accuracy of the witnesses of both the question to be determined by the jury depended upon their views of the liability of the defendant. They were in such better position, as was the learned trial judge, to determine the truth of the matter in controversy than we are. [illegible] the printed page [illegible]. The jury found in the plaintiff's favor [illegible] the evidence. [illegible] finding is a matter of [illegible] rights of the defendant. In these circumstances, we are not authorized to disturb the judgment.

2. The defendant through counsel [illegible] tion by unnecessary in that the defendant [illegible] with injuries were not fatal. The [illegible] the boy was knocked down and [illegible] and were contained [illegible] [illegible] medical attention. [illegible] being required to reduce a cast which [illegible] in the right chest; the [illegible] [illegible] therefore of the [illegible] [illegible]

head; that the boy had been in good health prior to the accident; that he apparently recovered in a short time, but afterwards was troubled with headaches and nervousness, and lost considerable weight. The testimony of the doctors is to the effect that the injuries, to some extent, are permanent; that there was a protrusion on the skull at the side of the depression at the time of the trial, which occurred more than four years after the accident. In these circumstances, we are unable to say that the verdict is so excessive as to warrant interference on our part.

3. Complaint is made to instruction No. 15, given at the request of the plaintiff. By it the jury were told "that a person operating an automobile upon the public streets of a city, must know and in law is bound to know that the public have the right to the use of the public streets and that persons may be upon them and it is the duty of persons operating automobiles upon the public streets to use reasonable care to avoid injuring persons who are upon the public streets.

The court does not by this or any other instruction in the case intimate any opinion on any question of fact in the case."

We think this instruction ought not to havebeen given, as it might tend to mislead the jury. However, the instruction did not direct a verdict and by other instructions the jury were told that the driver of defendant's automobile was not required to exercise the highest degree

of care to avoid injury to the plaintiff, but the law only required that he exercise ordinary care; that if the jury believed that plaintiff was injured as a result of a mere accident without any negligence on the part of the defendant no recovery could be had. The issue was not complicated, but simple and we think upon the whole the jury were fairly instructed and would not be misled by the instruction.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

of care to avoid injury to the plaintiff, and the law only required that he exercise ordinary care; that if the jury believed that plaintiff was injured as a result of a mere accident [illegible] the part of the defendant [illegible] duty to [illegible]. The issues were not complicated, but [illegible] upon the whole the jury were fairly instructed and could not be misled by the instruction.

The judgment of the District Court of [illegible] County is affirmed.

[illegible]

THOMPSON, J.A. [illegible] J. [illegible].

335 - 30188

4999

ALCOCK PLUMBING COMPANY,
a corporation,

Appellee,

v.

CLAUDIA E. HUNTER, herein
sued as MRS. R. C. HUNTER,

Appellant.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

240 I.A. 661

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover a claimed balance due of $950.72, with interest thereon, making a total of $981.82 "for work done and material furnished on an open account, which became an account stated on the 3rd day of January, A. D. 1928." A copy of the account was attached to the statement of claim and states that it is for "installing and overhauling plumbing and heating" at No. 3340 South Michigan avenue. The defendant filed an affidavit of merits in which she states her name to be "Claudia E. Hunter, sued as Mrs. R. C. Hunter" and avers that she is not indebted to the plaintiff in the sum of $981.82 or any other sum as alleged in plaintiff's statement of claim, but on the contrary, avers that plaintiff is indebted to her "by recoupment and setoff in a sum far in excess of the sum so alleged to be due from the defendant to the plaintiff." She then specifies the particulars whereby she claims plaintiff

Opinion filed Jan. 20, 1926.

owes her to the effect that there was an oral agreement between plaintiff and defendant and her husband, who own the property at No. 3340 South Michigan avenue; that in consideration of certain plumbing work to be done by plaintiff, she and her husband would pay to plaintiff the value of the work and materials; that the work was to be done in a workmanlike manner; that plaintiff negligently and carelessly performed the work so that a bath tub situated on the second floor leaked and caused damage to the extent of $235.00; that plaintiff removed and carried away Lead pipe from the premises of the value of $500.00 without defendant's knowledge or consent; that plaintiff also removed from the premises a bath tub of the value of $50.00 without defendant's consent; that the work was so negligently done by plaintiff that sewer gas escaped in the living rooms of the building and rendered them uninhabitable from October, 1921 until July, 1922, thereby damaging defendant in a sum "to far exceed the amount claimed by plaintiff." It is further averred that plaintiff agreed to repair the basement of the premises so as to prevent leaking and overflowing occasioned by rain; that plaintiff did the work so negligently in this regard that rain got into the basement and caused damage "which said damage and injury will more fully appear at the trial"; that more than half of the work which plaintiff agreed to do, it afterwards refused to perform and, as a result of this, the defendant was compelled to secure the services of other workmen to perform the work and defendant was compelled to expend for this work on account of plaintiff's default about $600.00.

over far to the effect that there was no oral agreement between plaintiff and defendant and her husband, who own the property at [illegible] Lough St. Upon evidence that in consideration of certain plumbing work to [illegible] done by plaintiff, she and her husband would pay to plaintiff the value of the work and material; that the work was to be done in a workmanlike manner; that plaintiff replumbed and satisfactorily returned the work on that a work bill amounted on the second floor ladies and gents toilet to the extent of $[illegible]; that plaintiff received and carried away land pipe from the premises of the value of $200.00 without defendants knowledge or consent; that plaintiff also removed from the premises a bath tub of the value of $50.00 without defendant's consent; that the work was so negligently done by plaintiff that sewer gas escaped in the living rooms of the building and rendered them uninhabitable from December, 1931 until July, 1932, thereby damaging [illegible] the amount claimed by plaintiff. [illegible] plaintiff agreed to repair the defects of the plumbing so as to prevent leaking and overflowing complained of; that plaintiff did the work so negligently [illegible] regard that pain got into the basement [illegible] water and damage and injury will arise [illegible] trial"; that more than half of the work which plaintiff agreed to do, is otherwise [illegible] to defendants, as a result of the [illegible] man came into [illegible] services of other workmen to complete the work [illegible] that was necessary to expend for extra work on account of plaintiff's default about [illegible].

The case went to trial before a judge and a jury and plaintiff put in evidence tending to show the terms of the agreement entered into between it and defendant; that the work had been done and payments made thereon from time to time by the defendant and numerous statements sent to the defendant, showing the balance claimed to be due. Plaintiff also offered further evidence to the effect that the defendant agreed to pay the balance which was $802.22. The evidence offered on behalf of plaintiff as to what work was done was very meager. The facts were not at all well brought out. But in view of the pleadings, it is clear that plaintiff was entitled to recover the amount of its claim.

At the close of the plaintiff's case, the defendant moved for a directed verdict which was denied and apparently defendant stood by her motion, whereupon the court instructed the jury to find for the plaintiff for $802.22. Since it appears that defendant's defense was based on the fact that she was entitled to recoup and setoff, she should have produced evidence tending to substantiate the averments of her affidavit of merits, but no such evidence was offered or produced. In these circumstances the learned trial judge was entirely warranted in directing a verdict for plaintiff.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

The case went to [illegible]

jury and plaintiff met in [illegible] the terms of the agreement [illegible] that [illegible] fraudulent; that the work had [illegible] [illegible] thereon time to time by the [illegible] [illegible] expenses sent to the [illegible], amounting [illegible] claimed to be due. [illegible] [illegible] dance to the extent [illegible] to pay the balance which was due. [illegible] [illegible] duty of plaintiff [illegible] [illegible] The facts were not in [illegible] [illegible] of the plaintiff, it is clear that [illegible] to recover the [illegible] of the claim.

At the close of the plaintiff's [illegible] [illegible] and moved for a directed verdict [illegible] [illegible] apparently defendant stood by her [illegible], [illegible] court instructed the jury to [illegible] [illegible] $800.00. [illegible] based on the fact that she was entitled to [illegible] [illegible] assert, she should have [illegible] [illegible] substantiate the averments of her [illegible], but no such evidence was offered or [illegible]. [illegible] circumstances the learned trial [illegible] [illegible] erred in directing a verdict [illegible].

The judgment of the Municipal Court of [illegible] is affirmed.

[illegible]

[illegible]

344 - 30197

WILLIAM HANDEL,

Appellee,

v.

HERMAN S. WALDMAN and LOUIS GOLD, On appeal of LOUIS GOLD,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 662

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

On December 2, 1924, judgment by confession was entered in favor of plaintiff against the defendants for $1114.58. The statement of claim shows that the suit was based on a promissory note for $1,000.00 dated September 18, 1924. The defendant Gold moved the court to vacate the judgment and for leave to defend. The motion was denied and he appeals.

The record discloses that Gold, in support of his motion to open up the judgment, submitted his affidavit wherein he stated "that he did execute the note upon which confession was entered, but states that the said note was fully paid and that there remains nothing due on the same." This is the substance of the affidavit. The record shows that the court considered this affidavit and thereupon the defendant by his counsel exhibited to the court ten checks for $100.00 each. These were exhibited to the court for the purpose of showing that the note in suit had been paid in full. The checks are dated April 26th, May 3rd, May 10th,

Opinion filed Jan. 30, 1956.

May 17th, May 24th, May 31st, June 7th, June 14, June 21st and June 28, 1924. These checks are all made payable to plaintiff's order and signed by the defendant Waldman, and all of them show that they have been paid by the bank on which they were drawn. The record further discloses that after these checks were exhibited to the court by the defendant, Gold, plaintiff exhibited to the court a promissory note dated Sept. 18, 1924, for $1,000. 00, due three months after date to plaintiff's order and signed by the two defendants. It further discloses that the plaintiff then exhibited to the court the note in suit which is signed by both defendants payable to plaintiff's order for $1,000.00 and dated September 18, 1924. The bill of exceptions then discloses that the court overruled the defendant's, Gold, motion to vacate the judgment, and he prayed and was allowed an appeal.

In this court the defendant contends that the court erred in considering the evidence of the cancelled checks and the notes above mentioned, because under the law, on such a motion the trial court has no power "to listen to evidence or consider counter-affidavits on a motion of this character." We are unable to understand how the defendant can seriously maintain such a proposition in this court when the record discloses that the checks tending to show payment were offered by himself and no objection was made when plaintiff afterwards submitted the two notes. The statement of claim discloses that the note on which the judgment was confessed was dated September 18, 1924, while all of the checks offered by the defendant were made and paid prior to that date. The last of the checks being

dated June 28, 1934, it is obvious that these checks could not be given in payment of a note dated September 18, 1934. There is no merit in this appeal.

Nor would the affidavit filed by the defendant in support of his motion to vacate the judgment, warrant the court in doing so. It merely states that the defendant did not execute the note and then immediately proceeds to say that the note has been fully paid. These two statements are contradictory. No dates are given or facts set forth, and it is obvious that the court would not be warranted in vacating the judgment on such an affidavit.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

dated June 20, 1924, it is obvious that the appeal could not be given in [illegible] 10, 1924. There is no merit in this [illegible].

[illegible] the [illegible] by the [illegible] in support of his motion to vacate the judgment, counsel [illegible] the court is doing so. It merely states that the [illegible] transfers did not encumber the [illegible] property to say that the [illegible] are contradictory. [illegible] or facts not [illegible], and [illegible] would not be [illegible] in vacating the judgment on [illegible] as affidavits.

The judgment of the [illegible] is affirmed.

[illegible]

[illegible], C.J. [illegible], C. [illegible].

353 - 30206

509

JOEL LEWIS AND JOHN I. SHEAHAN, doing business as Lewis-Sheahan & Company,

Appellants,

v.

PAULINE KRUK,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 662

Opinionfiled Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiffs brought suit against the defendant to recover $380.00, claimed to be due them for broker's fees in obtaining a purchaser for defendant's property. There was a verdict and a judgment in the defendant's favor and plaintiffs appeal.

The record discloses that the defendant was the owner of a two flat building located at No. 4356 Wilcox avenue, Chicago and employed plaintiffs, who were real estate brokers, to obtain a purchaser for her property or to exchange it for other property. The evidence further shows that plaintiffs, through their representative, proposed to defendant that she exchange her property for a six flat building belonging to other persons who had also employed plaintiffs as real estate brokers; that plaintiffs' representative showed the defendant the six flat building, which was located at Nos. 5808-10 West Erie street, and that plaintiffs also showed

Opinionfiled Jan. 20, 1926.

the defendant's property to the owners of the six flat building for the purpose of securing an exchange of the properties; that after considerable negotiations, plaintiffs prepared a contract for the exchange of the properties, which was executed by the defendant and by the owners of the property on Erie street. The evidence further shows that sometime later the defendant refused to carry out the contract and it was abrogated by the parties executing quit claim deeds, the defendant executing and delivering to the owners of the Erie street property a quit claim deed and they in turn quit-claiming any interest they might have in defendant's property. The plaintiffs demanded payment of the $390.00 commission claimed to be due them, which payment was refused, and this suit followed.

The defendant in her affidavit of merits set up that no commission was to be charged unless the deal was consummated by actual transfer of the properties and she further averred that in case the deal was consummated by the delivery of warranty deed, it was agreed that plaintiffs were to receive all their compensation for the services rendered, from the owners of the six flat building, and that in no event would the defendant be charged any commission.

The evidence shows that plaintiffs did a great deal of work in carrying on negotiations between the parties, and finally succeeded in having them execute a contract for the exchange of the properties. The defendant and some of her witnesses gave testimony to the effect that at the time the defendant signed the contract, which was on a regular blank form, the blank spaces had not been filled in. On behalf of the plaintiff, testimony was given

the defendants's property to the owners of the [illegible] for the purpose of assuring in exchange of [illegible] after considerable negotiations, [illegible] for the exchange of the properties, [illegible] defendant and by the consent of the [illegible] evidence further shows that [illegible] to carry out the contract was [illegible] executing quit claim deeds, the [illegible] ing to the owners of the [illegible] and they in turn quit-claimed [illegible] defendants's property. The plaintiffs [illegible] $5000.00 [illegible] claims to [illegible] [illegible] tract, and this suit followed.

The [illegible] that no contract was [illegible] [illegible] evaluation by [illegible] [illegible] averred that [illegible] of warranty [illegible] all their [illegible] of the six [illegible] [illegible] not be charged any [illegible].

The [illegible] of work in [illegible] ally concerned in having them execute a [illegible] of the property. The [illegible] testimony to the effect [illegible] contract, which [illegible] not been filled in. [illegible]

tending to show that the form on which the contract was written was fully filled in before it was signed by the defendant and the owners of the Erie street property. We are of the opinion that the version of the plaintiffs in this respect is sustained by the manifest weight of the evidence. A great deal of the testimony of the defendant and her witnesses is very unsatisfactory. The evidence shows that after the contract was executed, abstracts of title to the pieces of property were brought down to date and examined and certain objections made to the titles were removed. But the vital question for decision in the case was whether plaintiffs and defendant had agreed that the defendant would pay for their services. A witness for the plaintiff testified that the defendant had agreed to pay plaintiffs $390.00 for their services, while defendant and one of her married daughters testified that no such promise was made, but on the contrary, that plaintiff's representative stated that he would not charge her any commission for the exchange of the properties, but that plaintiffs would obtain their payentirely from the owners of the Erie street property. The defendant testified: "Charles Sheahan did not tell me that I would have to pay $390.00 for commission. He said I don't want a penny from me because the other side want to pay all commission, because I ain't got the money." Mary Aacheim, defendant's daughter, testified that she was present when the contract was signed by her mother, and that plaintiffs' representative at that time did not say to her mother that she would have to pay a commission of $390.00. Another daughter of defendant

testing to show that the form on which the contract was written was fully filled in before it was signed by the defendant and the owners of the title street property. It is the opinion of the court that the version of the plaintiffs in this respect is corroborated by the greatest weight of the evidence. A great deal of the testimony of the defendant and her witnesses is very unsatisfactory. The evidence shows that after the contract was executed, conveyances of title to the places of property were brought down to date and examined and certain objections made to the titles were removed. But the vital question for decision in the case was whether plaintiffs and defendant had agreed that the defendant would pay for their services. A verdict for the plaintiff testified that the defendant had agreed to pay plaintiffs $300.00 for their services, while defendant had one of her retained counsel testified that no such promise was made, but on the contrary, that counsel's representative stated that he would not charge her any commission for the purchase of the property, but that plaintiffs so led obtain their payments from the owners of the fee street property. The matter is testified: "Counsel Bracken did not tell me that I would have to pay $300.00 for commission. He said I don't want a penny from the person the other side want to pay all commission, because I didn't for the money." Only believing, reasonable daughter, testified that she was present when the contract was signed by her mother, and that plaintiffs representative at that time did not say to her mother that she would have to pay a commission of $300.00. Another witness of defendant

Elizabeth Kruk, testified that she heard a conversation between plaintiffs' representative and her mother in which the representative said "that the commission would come entirely from the other side" meaning the owners of the Erie street property.

There is other evidence in the record showing what work plaintiffs did, but we think it unnecessary to refer to it, because plaintiffs would not be entitled to recover if the agreement between them and the defendant was that plaintiffs were to charge the defendant nothing, but were to obtain all of their pay from the owners of the Erie street property. The jury evidently were of the opinion that plaintiffs looked entirely to the owners of the Erie street property for their compensation, and upon a careful consideration of all the evidence in the record, we are unable to say that their finding is against the manifest weight of the evidence. In these circumstances, we are not warranted, under the law, in disturbing the verdict.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Elizabeth King, testified that she found a conversation between plaintiffs' representative and her father : while the representative said "that the company would come entirely from the other side" meaning the owners of the fee interest property.

There is other evidence in the record showing that such plaintiffs did, but we think it unnecessary to refer to it, because plaintiffs in its petition to recover if the agreement between them and the fee owner that plaintiffs were to occupy the premises rent-free, but were to obtain all of their pay from the owners of the fee street property. The jury evidently were of the opinion that plaintiffs looked entirely to the owners of the fee street property for their compensation, and in a certain consideration of all the evidence in the record, we are unable to say that their finding is not among the conflict weight of the evidence. In these circumstances, we are not warranted, under the law, in disturbing the verdict.

The judgment of the Jackson Court of Appeals is affirmed.

ADDISON.

TO WHOM, C.J. and LEWIS, J., DISS.

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362 - 30215

THE PERFEX MANUFACTURING CO., a Corporation,

Appellee,

v.

A. DAIGGER & COMPANY, a Corporation,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

240 I.A. 662

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of assumpsit against the defendant to recover $2229.54, claimed as a balance due on account of merchandise sold and delivered by plaintiff to defendant. A jury was waived, the cause submitted to the court and after a hearing, there was a finding and a judgment in plaintiff's favor for the amount of its claim and the defendant appeals.

The record discloses that in March, 1921, plaintiff sold defendant 135 "perfex overrun testers" at a certain specified price. These were delivered from time to time, the first delivery being made about March 28, 1921 and the last about July 30, 1921. The total price of these testers was $2485.10. The evidence shows that upon each delivery, plaintiff submitted to the defendant its bill which showed that the installment was

Opinion filed Jan. 20, 1928.

to be paid for within thirty days. The evidence further shows that no payments were made and in June and July 1921, after a considerable number of the testers had been delivered, plaintiff demanded payment of the defendant; that the defendant requested plaintiff to wait awhile so that the defendant would be in a position to know that the testers were all right, the defendant having sold them from time to time to its customers and this request seems to have been acquiesced in by plaintiff. A witness for the plaintiff testified that he sent a statement of the amount due each month to the defendant and there is no countervailing evidence on this point. No payment was made by the defendant until November 19, 1921, when it sent its check for $216.03 to the plaintiff. The check is what was designated as a voucher check and at the bottom of it appears the following, written by the defendant, "Payment in full up to date of Perfex and Hydro accounts as per attached statements $216.03." On the back of the check was printed the following, "This check is accepted by the payee in full settlement of the within account. If incorrect return without alterations and state difference." Accompanying the check, as stated in the voucher attached to it were two itemized statements, one of the Hydro account, which tends to show that the Hydro Company was indebted to the defendant for $1878.80, the other showing the Perfex account in which defendant takes credit for $1878.80 and after other small deductions shows a balance due plaintiff from the defendant of $216.03, the amount of the check. Upon receipt of the check with the accompanying statements,

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plaintiff deposited the check and it was paid in due course through the bank on which it was drawn. On November 21, 1921, two days after the date of the check, plaintiff wrote the defendant a letter in which it stated: "We are in receipt of your voucher No. 107, dated Nov. 19th, in the sum of $216.03, on which you have noted that it is in full payment of our account to date.

" We are unable to reconcile these figures with our books, but have deposited the same to the credit of your account and will submit a statement shortly of the differences which we cannot reconcile."

A witness for the plaintiff testified that in the latter part of November, 1921, (but whether before, or after the above letter was written, does not appear) he called defendant by telephone and talked with the president of the defendant company, and told him that he was speaking for the plaintiff company; that he had received defendant's check for $216.03, which defendant seemed to have the idea was in full settlement of plaintiff's account; but that there was still a balance due of $2229.54; that the defendant's president said that so far as the defendant was concerned plaintiff's bill was paid in full and if plaintiff expected to get any more money it would have to look to Henry W. Stern for it. The witness testified that he then stated that unless the $2229.54 was paid promptly, plaintiff would turn the matter over to its attorneys. The defendant's president testified to this

[illegible]

[illegible]

[illegible]

conversation having been had substantially to the same effect, except that he said he told plaintiff's representative in that conversation that it was the defendant's understanding with Henry W. Stern, "who had always represented himself to be the owner of the Hydro Company and the Perfex Company" that the Hydro account could be deducted as defendant had done, and that plaintiff's representative replied that this could not be done.

The evidence further shows that sometime in January, 1920, Henry W. Stern was employed by the defendant company in charge of one of its departments and that he in turn employed his brother, Albert A. Stern, to act as salesman for defendant. Later, Albert A. Stern became the president of the plaintiff company, which company was organized as a corporation in the spring of 1921; that in 1920, when the two Stern brothers were working for the defendant, certain testers were sold to the defendant by the Hydro Company, a corporation, of which Henry W. Stern represented himself to be the owner. These Hydro testers were afterwards sold to the defendant's customers and proved to be unsatisfactory and they were returned by the customers to the defendant company and a charge was made by the defendant company against the Hydro Company on account of the return of these Hydro testers, the amount being $1878.80, which the defendant claimed was due it from the Hydro Company. This is the account that the defendant sought to offset against plaintiff's claim on the theory that the plaintiff corporation was the successor of the Hydro corporation and that Henry W. Stern represented to the defendant that he controlled both of those companies. Evidence offered on behalf of the

conversation having been had substantially to the same effect, except that he said he told plaintiff's representative in that conversation that it was the defendant's understanding with Henry A. Steers, "who had always represented it will be to be the owner of the Hydro Company that the latter thought that the Hydro account could be conducted as defendant had done, and that plaintiff's representative replied that this could not be done.

The evidence further shows that commencing in January, 1906, Henry A. Steers was employed by the defendant company in charge of use of the Hydro-Electric and that he is then employed his brother,Albert A. Steers, to act as salesman for defendant. Later, Albert A. Steers became the president of the Hydro-Electric Company, which company was organized as a corporation in the spring of 1907; that in 1909, when the two Steers brothers were working for the defendant, Henry A. Steers also sold it to the defendant by the Hydro Company, a corporation, of which Henry A. Steers represented himself to be the owner. These Hydro Steers were different in the defendant's customers. It proved to be unsatisfactory and they were returned by the defendant to the individual company and a bill was made by the defendant company against the Hydro Company on account of the return of these Hydro Steers. The account among 1909, which the defendant claims was due it from the Hydro Co., This is the account that the defendant claims that plaintiff's claim on the theory that defendant was the successor of the Hydro Company. Henry A. Steers represented to the defendant that he controlled both of these companies. Defendant offered on behalf of the

plaintiff was to the effect that Henry W. Stern had no connection with the plaintiff corporation and that plaintiff knew nothing about the Hydro account until it received defendant's check for the $216.03. This evidence is undisputed. The defendant contends that it sent its check to plaintiff accompanied by the two statements and tendered the check in full payment of plaintiff's claim, and that since plaintiff accepted and cashed the check, this constituted an accord and satisfaction. In support of this the case of Ostrander v. Scott, 161 Ill. 339 and other cases are cited.

It is held in the Ostrander case that payment of a part of a fixed and certain demand which is due and not in dispute is no satisfaction of the whole debt, even where the creditor agrees to receive it in full payment of the demand. This doctrine is put upon the ground that the discharge of the entire debt is without consideration. It is further held, in that case, that that rule has no application "to the honest settlement of unliquidated or disputed demands * * * and if the balance due is disputed and the subject of an honest settlement and adjustment by the parties, such settlement will bar a recovery." It is also the law that it is not every dispute that will render an account unliquidated, but it is held that there must be a bona fide dispute as to how much is due to render the account unliquidated. Snow v. Griesheimer, 220 Ill. 106. The law as above stated is not disputed by either party. The question, therefore, for decision is whether there was a bona fide dispute between the plaintiff and defendant as to the amount that was due when

the defendant sent its check for $203.16. There is no complaint that plaintiff's bill was due and unpaid, but it is defendant's contention that since it had the right to setoff against the amount of plaintiff's claim the Hydro account, this rendered the amount which the defendant owed plaintiff, uncertain and unliquidated, and therefore, the acceptance of the check by plaintiff constituted an accord and satisfaction. Of course, the account would be unliquidated if there was a bona fide controversy over defendant's right to setoff the Hydro account. Ostrander v. Scott, supra. But we are of the opinion that there was no dispute between the parties as to the amount due when the defendant tendered its check, because the evidence shows without dispute that the first plaintiff knew anything about the Hydro account, was when it received the check. And the uncontradicted evidence further is that the Hydro Company had no connection with the plaintiff company. But in any view of the case on this point, we are of the opinion that the finding of the trial judge to the effect that there was no bona fide dispute, is not against the manifest weight of the evidence. In these circumstances, it is obvious that there was no accord and satisfaction.

The defendant further contends that the court erred in not receiving competent evidence offered by it and in admitting improper evidence over its objection. In support of this it is said that the court erred in permitting Albert A. Stern to testify on behalf of the plaintiff that he entered into the contract for the sale of the Perfex testers, the ones involved in this suit, with the defendant company, through Henry W. Stern, because it was not

the defendant kept its check for $603.18. There is no complaint that plaintiff's bill was not authorized, but it is defendant's contention that since it had the right to setoff against the amount of plaintiff's bill the Hydro account, this resulted [illegible] the defendant owed [illegible] and [illegible] unliquidated, and therefore, the acceptance of the check by plaintiff constituted an accord and satisfaction. Of course, the amount would be unliquidated if there was a bona fide controversy over defendant's right to setoff the Hydro account. [illegible] v. Apple, supra. But [illegible] there was no dispute between the parties as to [illegible] the defendant [illegible] the evidence shows without dispute that the [illegible] plaintiff [illegible] anything about the Hydro account, [illegible] when it received the check. And the uncontradicted evidence further is that [illegible] Company had no connection with [illegible] company. [illegible] in any view of the evidence [illegible] that the [illegible] of [illegible] was no bona fide dispute [illegible] of the evidence. [illegible] these circumstances, [illegible] that there was [illegible] accord and satisfaction.

The third and further contention [illegible] that the court erred in not receiving evidence which [illegible] offered by it and in admitting [illegible] evidence [illegible] objection. In support of this it [illegible] testimony of Albert A. [illegible] testifying on behalf of [illegible] that he [illegible] statement, the [illegible] in this suit, [illegible] ant company, [illegible]

shown that Henry W. Stern had authority to purchase the testers. There is no merit in this contention, because defendant accepted all of the Perfex testers and re-sold them to its customers and no complaint was at any time made, either on the trial of the case or in this court, that the defendant did not owe the amount plaintiff claimed for these testers, the only contention of the defendant being that it was entitled to its counter-claim on account of the Hydro account. Under these circumstances, it is obvious that the question of Henry W. Stern's authority to purchase the testers on behalf of the defendant was in no way involved. Nor was there error in the ruling of the learned trial judge in not permitting a witness for the defendant to testify what Henry W. Stern said to the witness concerning the testers in question, since the evidence disbloses, without dispute, that Henry W. Stern had no connection with the plaintiff company.

Complaint is also made that the judgment is excessive in that plaintiff had not received its charter of incorporation until the 14th of April, 1921, and the evidence discloses that some of the testers for which plaintiff sued were delivered before that time; that plaintiff on the trial sought to show that he had invested his money for the making of the first testers and after plaintiff was incorporated, transferred his claim for those testers to the plaintiff corporation; that this evidence was admitted over defendant's objection; that the defendant then raised the point that since it appeared from the evidence plaintiff was suing for part of its claim as assignee of Albert A.

shown that Henry v. Storrs had authority to purchase the tractors. There is no merit in this contention, because defendant received all of the tractors because Henry v. Storrs made, either on the trial of the case or in its brief, that the defendant did not own the amount originally claimed for these tractors. The only connection of the defendant being that it was entitled to the warrant-claim on account of the Hydro account. Under these circumstances, it is obvious that the question of Henry v. Storrs's authority to purchase the tractors on behalf of the defendant was in no way involved. Nor was it error in the ruling of the learned trial judge in not permitting a witness for the defendant to testify when Henry v. Storrs said to the witness concerning the tractors in question, since the evidence disclosed, without dispute, that Henry v. Storrs had no connection with the plaintiff company.

Complaint is also made that the judgment is erroneous in that plaintiff has not proved the notice of incorporation and the lack of capital. But, the evidence disclosed that some of the tractors for which the trial court were delivered before the plaintiff on the trial sought to show that he had invested the money for the making of the first tractors and that plaintiff was incorporated, brought his claim for those tractors to the plaintiff corporation; so that evidence was admitted over defendants objection; when the defendant then raised the point that since it appeared that the corporation plaintiff was suing for part of the claim as assignee of Henry v.

Stern, it could not recover because there was no compliance with section 18 of the Practice Act. It is clear that the evidence of the witness Stern should not have been admitted over defendant's objection, but it is equally clear that the defendant is not entitled to receive any benefit on this account, because as already stated the amount plaintiff claimed in this suit was admitted by the defendant to be due and owing from it to the plaintiff. The only controversy being as to whether there was an accord and satisfaction, on account of the defendant, sending its check for $216.03 as above stated and taking credit for its counter-claim on account of the Hydro account.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Given, it could not however because there was no reliance with credit in it of the previous act. It is it so that the evidence of the witness [illegible] have been subjected over documents [illegible], and it is equally clear that the defendant is not entitled to receive any benefit on this account, because as already stated the amount claimed in this suit was included in the defendant's [illegible] and only then is the claimant. The only contemporary [illegible] to whether there was an account and [illegible], on the part of the defendant, making its chose [illegible] and [illegible] not taking credit for its counter-claim on account of [illegible] account.

The judgment of the [illegible] is of [illegible] is affirmed.

H.T. [illegible]

[illegible]

371 - 30224

JOSEPH BRASHKE,

Appellee,

v.

CHICAGO CITY RAILWAY COMPANY, ET AL,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

Opinion filed Jan. 20, 1926.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This suit was brought by plaintiff to recover damages claimed to have been sustained for personal injuries occasioned by the negligence of the defendants in the operation of one of its street cars. There was a verdict and a judgment in plaintiff's favor for $1500.00 and the defendants appeal.

Plaintiff's theory of the case as shown by the evidence, was that he was a passenger on one of defendants' eastbound street cars, operating in 51st street, Chicago; that he obtained a transfer from the conductor of that car, which stopped at State street; that he alighted from the car and crossed over to the southeast corner of State and 51st streets to take a northbound State street car and, while in the act of boarding the State street car, it was started and the conductor of the car endeavored to close the doors of the street car which raised the step and caused plaintiff to fall. His right foot was caught under the step and the bone fractured. On the other hand, the

Opinion filed Jan. 20, 1928.

[illegible]

of the court.

[illegible]

defendants' theory was that the State street car stopped to receive and discharge passengers when it reached a point near the south side of the intersection at 51st street; that the car then started up after passengers had all boarded the car; that plaintiff ran around the front end of the northbound State street car and attempted to board it while it was moving and that the conductor did not raise the steps of the car at all.

At the close of the plaintiff's case and at the close of all the evidence, the defendants moved for a directed verdict which motion was overruled and it is contended this was error. It is further contended that in any event, the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence and the judgment based thereon, should be reversed. The case went to the jury on the second and third counts of the declaration. The second count alleged that the defendants caused the car to be suddenly started and the step closed as a result of which plaintiff was thrown and injured while in the act of boarding the car. The third count charged that the defendants negligently, suffered and permitted the step of thecar to remain in a slippery, wet and icy condition, and that the defendants negligently started the car and caused the step to be folded while plaintiff was in the act of boarding the car.

For the plaintiff, Janoda Buckner, testified that at the time in question she was waiting at the southeast corner of the intersection of the two streets to board the northbound State street car; that there were other persons

defendants' theory was that the first street car stopped to receive and discharge passengers when it reached a point near the north side of the intersection of 61st street; that the car then started on after passengers had all boarded the car; that plaintiff ran around the front end of the northbound State street car and attempted to cross it while it was moving and that the conductor did not raise the steps of the car at all.

At the close of the plaintiff's case and the close of all the evidence, the defendants moved for a directed verdict which motion was overruled and it is contended this was error. It is further contended that in any event, the finding of the jury in favor of the plaintiff is against the manifest weight of the evidence and the judgment based thereon, should be reversed. The case went to the jury on the second and third counts of the declaration. The second count alleged that the defendants caused the car to be suddenly started and the step closed as a result of which plaintiff was thrown and injured while in the act of boarding the car. The third count charged that the defendants negligently, carelessly and permitted the step of theirs to remain in a slipshod and lax condition, and that the defendants negligently started the car and caused the step to be jolted while plaintiff was in the act of boarding the car.

For the plaintiff, James Boucher, testified that at the time in question she was waiting at the northwest corner of the intersection of the two streets to board the northbound State street car; that there were other persons

ahead of her and plaintiff was standing immediately behind her for the same purpose; that after those persons ahead of her and the witness boarded the car, it was immediately started and that she saw the conductor attempt to close the doors of the car; that she heard plaintiff scream and saw him fall on the steps of the car.

Plaintiff testified in his own behalf that he had been a passenger on an eastbound car in 51st street and obtained a transfer from theconductor of that car to proceed north on the State street car; that he alighted from the 51st street car and walked over to the southeast corner of the intersection as the State street car was approaching from the south; that he stood there waiting to board the car, immediately behind the witness Buckner; that she got on the car and he started to board it after her; that the car was then standing still; that he took hold of the two upright handles and had his left foot on the south half of the step, the place for passengers to enter the car; that there was a space between the north end of this step and the step which was used by persons to alight from the car; that the step was icy; that the car was started before he had time to board it, and that the conductor attempted to raise the steps to close the doors; that his right foot slipped into the space between the two steps and he was thrown and injured.

For the defendant, James J. O'Brien, testified that he was on theback platform of the State street car at the time in question; that five or six people, including himself, boarded

plaintiff scream and saw him fall on the steps of the car.

Plaintiff testified in his own behalf that he had been a passenger on an westbound car in 21st street and obtained a transfer from the conductor of that car to proceed north on the State street car; that he alighted from the 21st street car and walked over to the southeast corner of the intersection as the State street car was approaching from the south; that he stood there waiting to board the car, immediately behind the witness Brunner; that she got on the car and he started to board it; that the car was then standing still; that he took hold of the two straight handles and had his left foot on the south half of the step, the place for passengers to enter the car; that there was a space between the board and of this step and the step which was used by persons to alight from the car; that the step was low; that the car was started before he had time to board it, and that the conductor attempted to raise the step to close the house; that his right foot slipped into the space between the two steps and he was thrown and injured.

For the defendant, James J. Ottman, testified that he was on the front platform of the State street car at the time in question; that five or six people, including himself, boarded

ahead of her and plaintiff was standing immediately behind her for the same purpose; that after those persons ahead of her and the witness boarded the car, it was immediately started and they, she and the conductor attempt to close the doors of the car; that she heard plaintiff scream and saw him fall on the steps of the car.

the car at that point; that after the car started up and had traveled about forty feet, he heard a "thud hit the car. I looked around and a young fellow was lying on the step; just lying on, holding on to the handle, with his feet towards the south, holding on to the grab handle, lying down."; that another passenger who was on the back platform and the conductor went to the young man's assistance and got him up on the platform of the car; that he did not see the young man prior to the time he heard the thud; that he did not particularly notice whether the door of the car was closed at that time. On cross-examination he testified that he had come on the 51st street car and that when he boarded the State street car there were one or two persons back of him who also wanted to board the car; that he was prepared to hand his transfer to the conductor when he heard the thud as of some one striking the steps of the car; that he did not remember any movement made by the conductor to close the doors of the car. He further testified that as he remembered, "Both doors of the car were wide open, but I haven't got it clear. It is a long time ago."

Peter Clarke, conductor of the State street car, testified that six or seven passengers boarded his car at the time in question; that after all had gotten on, he gave a signal to the motorman to go ahead and at that time no one was getting on or off; that he did not close the doors; that he was not operating the doors of the street car on that date; that he had been a conductor on the cars for three or four years and had not been in the habit of closing

the car at that point; then after the [illegible] had travelled about forty feet, he began a round of the car. I looked around and a young [illegible] was lying on the floor just lying on, holding on to the handle, with his feet towards the south, holding on [illegible] lying down."; then a [illegible] passenger who was on the same platform and the conductor went to the young man's assistance and got him up on the platform of the car; that he did not see the young man prior to the time he heard the bump; that he did not particularly notice anything [illegible] the door was closed on [illegible]; he observed something [illegible] that he had come on the train with [illegible] inspected the train after [illegible] the door of the car [illegible] proceeded to hand in tickets to the conductor [illegible] the time as of some one [illegible] of the car, that he did not remember any noise [illegible] close the doors of the car. [illegible] remembered, both doors of the car were [illegible] haven't got it clear. It is a [illegible].

[illegible] transition [illegible] the time in question [illegible] a signal to the [illegible] one [illegible] that he was not aware of [illegible] that door; that [illegible] stand or four [illegible]

the doors after the passengers had alighted from the car; that he gave his signal to the motorman by pulling the bell; that after the car had started up, he heard a heavy sound hitting the step; that the car was then about midway in the intersection; that he saw the young man down on the step, holding on to the grab-handle; that he helped him up on the platform and stopped the car and that at no time did he raise or lower the steps or attempt to close the doors of the car.

There is other evidence tending ti show that there had been slight snow flurries in the morning and other evidence to show that the day was bright and clear and that it was not cold or wet. This is the substance of the evidence in the record as to how the accident occurred.

The motorman testified that after stopping at the south side of 51st street, he got the signal to go ahead and started the car; that when the car had reached a point about the south or eastbound track in 51st street, a young man ran in front of the State street car from the west; that the car kept moving until he got some distance north of 51st street when he received three bells to stop, which he did; that he went back and found a young man sitting on the back platform and called the ambulance to take him to a hispital. He testified he could not swear that it was the same man that was injured that he saw running in front of the car. In rebuttal plaintiff testified that he did not run in front of the State street car; that he walked over to the

the doors after the passengers had alighted from the car; that he gave the signal to the conductor by pulling the bell; that after the car had started up, he heard a heavy sound striking the step; that the car was then about midway in the intersection; that he saw the young man down on the step, holding on to the grab-handle; that as he raised his up on the platform and observed the car and that at no time did he raise or lower the shade or attempt to close the doors of the car.

There is other evidence tending to show that there had been a light snow flurries in the morning and other witnesses to show that the day was bright and clear and that it was not cold or wet. This is the substance of the evidence in the record as to how the accident occurred.

The defendant testified that after departing at the south side of 43rd street, he put the signal to go ahead and started the car; that when the car had reached a point about the south or westbound track in 43rd street, a young man ran in front of the track which was from the west; that the car kept moving until he had a slight collision with of Mr. Grace when he received three rolls to step; which he did; that as that he had found a young man sitting on the back platform and called the conductor to take him to a hospital. He testified he could not tell if it was the same man that was injured when he was running in front of the car. In rebuttal the motorman testified that he did not see in front of the track after he had passed on the

proper place to board the car, while it was approaching him from the south.

We think that all reasonable minds would not reach the conclusion that the plaintiff was guilty of contributory negligence or that the defendant was free from negligence. In these circumstances, these questions were properly submitted to the jury. Libby, McNeill & Libby, v. Cook, 222 Ill. 206. And upon a careful consideration of all the evidence in the record, we are also of the opinion that we would not be warranted in holding that the verdict of the jury to the effect that plaintiff was free from negligence and the defendant guilty of negligence is against the manifest weight of the evidence. The jury saw and heard the witnesses testify, as did the trial judge. The jury found in favor of the plaintiff. Their finding was affirmed by the trial judge and after a careful consideration of the evidence, we cannot say that the action of the judge and jury, who were in a much better position to determine the truth of the matter than a court of review, is against the manifest weight of the evidence. The jury were specifically advised, at the request of the defendant, in two instructions as to the negligence charged in the two counts of the declaration. No complaint is made that the instructions given or refused were incorrect. There is no complaint as to the admission or exclusion of evidence, nor as to the amount of the verdict. We think the record is free from any serious error and the judgment of the Superior Court of Cook County will, therefore, be affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

proper place to hold the car, which is a contributing
bile from the world.

To claim this all reasonable [illegible] is not
need the conclusion that the plaintiff was guilty of
contributory negligence or that he contributed a [illegible]
from negligence. In these circumstances, some omission
were properly submitted to the jury. Jones, [illegible]
v. Cook, 287 Ill. 240, and upon a careful consideration of
all the evidence in the record, we are [illegible]
that we should not be [illegible] in holding that [illegible]
of the jury to the effect that plaintiff was free from contri-
gence and the reasonable quality of [illegible]
the medical expert [illegible] witnesses. The jury saw and heard
the witnesses testify, [illegible] the trial judge. The jury
heard in favor of the plaintiff. Their finding was [illegible]
by the trial judge in [illegible] conflicting evidence of the
evidence, we cannot say that the [illegible] of the jury in
jury, who were in a much better position to determine the
truth of the matter than a court of review, in regard to the
medical weight of the evidence. The jury was [illegible]
advised, at the request of the defendant, in the instructions
as to the negligence charged in the [illegible] of the defendan-
tion. We conclude it was [illegible] the instructions given or
refused were incorrect. There is no prejudicial [illegible]
admission or exclusion of evidence. [illegible]
of the verdict. We find the record is free from reversible
error and the judgment of the [illegible] should be
affirmed, as modified.

Modified.

McBRIDE, P.J., and MALAN, J., concur.

5004

349 - 30102

THE FAIRBANKS COMPANY,
a corporation,

Appellant,

v.

UNITED STATES FIDELITY AND
GUARANTY CO., a corporation,

Appellee.

240 I.A. 662

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

Substantially the same matters that are involved in this appeal were before this court once before - The Fairbanks Company v. United States Fidelity and Guaranty Company, General Number 28671 (opinion filed March 11, 1924) - and in our judgment that case is decisive of this.

The issue in the former case, which was begun in the Circuit Court, was precipitated by an amended bill of complaint and a general demurrer. At a hearing before the Chancellor, the demurrer was sustained and a decree entered dismissing the bill for want of equity. That decree was afterwards, on March 11, 1924, affirmed by this court.

Subsequently, on August 30, 1924, the complainant began the present suit in the Superior Court. The issue in this case was made up as the result of an amended bill of complaint filed on December 16, 1924, and a general demurrer. The demurrer was sustained and a decree entered that the bill

Opinion filed Jan. 30, 1932.

of complaint be dismissed for want of equity. This appeal is from that decree.

Being of the opinion, as said above, that the matters involved in the present appeal were adjudicated in the former case, it becomes necessary, in order to demonstrate the justice of that conclusion, to compare the allegations of the amended bill of complaint in the former case with those in the present case. In the opinion of the court in the former case the substance of the bill is recited as follows:

> "In said amended bill, complainant, a New Jersey corporation - licensed to do business in Illinois, alleges in substance that 'prior to September 1, 1921, the exact date being unknown to your orator,' defendant, for a valuable consideration, executed and delivered to complainant its bond, whereby it agreed to reimburse complainant to the extent of $10,000 for any money or property that one Timmons, its employee, would embezzle or otherwise convert to his own use while in its employ; that complainant does not know the exact terms of the bond as the same is now in defendant's possession; that Timmons, during the years 1920 and 1921, stole divers sums of money and property from it; that during an examination of complainant's books in April, 1921, by a certified public accountant, the latter informed complainant that Timmons had stolen various sums aggregating $2,724.81; that complainant relied on the accountant's report and believed it was correct and complete, and, under that belief, notified defendant, in August, 1921, of said defalcations 'to the extent of said foregoing sum only,' and delivered to defendant a true copy of the itemized list of said defalcations prepared by said accountant; that, thereupon, defendant, relying upon said list and believing it to be correct and complete, on or about September 1, 1921, paid to complainant said sum, and complainant delivered up the bond to defendant, who 'thereupon cancelled it;' that defendant saw the records that contained all the embezzlements, but 'overlooked undisclosed and additional defalcations that existed at the time,' and 'agreed with your orator that the total embezzlement of Timmons amounted to $2,724.81;' that on or about April 1, 1922, a general audit of complainant's books was 'commenced,' and complainant learned that both it and defendant were 'mutually mistaken' in deeming said sum to be the total amount that Timmons

of complaint be dismissed for want of equity. This con-
is from that decree.

Being of the opinion, as said above, that the
matters involved in the present [illegible] adjudicated
in the former case, it becomes necessary, in order to
demonstrate the justice of that adjudication, to compare
the allegations of the amended bill of complaint in the
former case with those in the present case. In the opin-
ion of the court in the former case the substance of the
bill is restated as follows:

> "In said amended bill, complainant, a New Jersey corporation - licensed to do business in Illinois, alleges in substance that 'prior to September 1, 1921, the exact date being unknown to your orator,' defendant, for a valuable consideration, executed and delivered to one Lorant its bond, whereby it agreed to reimburse complainant to the extent of $10,000 for any money or property that one Timmons, its employee, might embezzle or otherwise convert to his own use while in its employ; that complainant does not know the exact terms of the bond as the same is in the defendant's possession; that Timmons, during the years 1920 and 1921, stole divers sums of money and property from it; that during an examination of complainant's books in April, 1921, by a certified public accountant, the latter informed complainant that Timmons had stolen various sums amounting to $14,000; that complainant relied on the accountant's report and believed it was correct and simple, and, under that belief, notified defendant, in August, 1921, of said defalcations 'to the extent of said Timmons' misuse only,' and delivered to defendant a copy of the itemized list of said embezzlements supplied by said accountant; that, thereupon, defendant, relying upon said list and believing it to be correct and complete, on or about September 1, 1921, paid to complainant the sum, [illegible] dollars, and up to the bond to defendant, who thereupon cancelled it;' that defendant has failed to reimburse complainant the embezzlements, but [illegible] and notwithstanding demand [illegible] and 'serious with your orator that the said embezzlement of Timmons amounted to $[illegible]' on or about April 1, 1920, a period [illegible] before the 'discovered,' but complainant learned that both it and defendant were 'entirely ignorant' [illegible] [illegible] said sum to be the total amount that Timmons

had stolen; that complainant, immediately upon ascertaining said 'mutual mistake,' notified defendant thereof, and, during 'such additional examination,' on June 7, 1922, further notified defendant that it (complainant) 'rescinded the release settlement' of September 1, 1921, and at the same time tendered back to defendant the sum of $2,724.81, and demanded said bond, but defendant failed to deliver it or to inform complainant of the terms thereof; and that said additional examination was completed about July 1, 1922, and disclosed that Timmons had stolen, in addition to the $2,724.81, divers sums that 'had been overlooked through the miscalculation and mutual mistake' of complainant and defendant at the time of the settlement of September 1, 1921, as follows:

"July, 1920,	Check of Continental Supply Co., St. Louis, Mo.	$1,142.20
Sept., 1920,	Check of O. T. O'Malley, Kansas City, Mo.	3,859.75
1920,	Check of Morris & Co., Chicago, Ill.	383.
1920-1921	Checks unknown as to identity, but specifically admitted by Timmons to have been converted by him.	550.
1920 -1921	Checks received and possibly diverted by Timmons.	35,638.17.

That on July 7, 1922, complainant notified defendant by a sworn statement of said additional defalcations and 'demanded that the defendant rescind said settlement of September 1, 1921, because of said mutual mistake of fact,' and reimburse complainant for said additional money so stolen, both of which demands defendant refused.

The prayer of the bill is that the settlement of September 1, 1921, be rescinded and held to be binding only to the extent of $2,724.81; that the original bond be deemed to be in full force and effect; and that complainant may obtain a money decree against defendant, to the extent of the bond, for the entire amount of money so stolen by Timmons."

The allegations in the amended bill of complaint in the present case cover twenty-five pages of the record, and being so voluminous it is, of course, impracticable even to set forth an intelligible summary of its contents in this opinion.

Counsel for the complainant, however, in his brief'

The allegations in the amended bill of complaint in the present case concerning [illegible] of the [illegible] and being so voluntary in its, of course, [illegible] to set forth an irrefragible answer to the question in the opinion.

Counsel for the complainant however, in their brief

states that the facts recited in the amended bill of complaint in the present case that were not contained in the amended bill of complaint in the Circuit Court case, are as follows:

(1) The general release was under seal;

(2) The later discovered embezzlements were successfully concealed by the embezzler because they were made possible by reason of omitted entries;

(3) The embezzler had sole control of approximately 1,000 separate accounts, involving thousands of entries;

(4) The manner in which the embezzler first was suspected and his successive disclosures;

(5) The fraudulent and clever concealment of the embezzler of all his peculations so that the complete details thereof could not be discovered or ascertained by an audit;

(6) The further fraudulent conduct of the embezzler during an audit by failing to make disclosures that would have shown all his embezzlements at the time;

(7) The knowledge of the defendant that the embezzler was present during the audit and the retention by the defendant of the general release under seal after it knew of this fraud;

(8) The details of the later discovered embezzlements and the manner in which the embezzler skillfully and successfully escaped detection thereof;

(9) The indictment of the embezzler; and

(10) The reason why a copy of the insurance bond or contract is not set forth in the bill of complaint;"

The prayer for relief in the bill of complaint in the instant case is for a decree finding that the complainant is entitled to a rescission and cancellation of

states that the facts recited in the amended bill of complaint in the present case that were not mentioned in the amended bill of complaint in the Dixie Ice Cream case, are as follows:

(1) The general relieves are quite real;

(2) The later discovered substrata were successfully concealed by the defendant because they were made possible by reason of omitted matter;

(3) The defendant had made counterfeit approximately 1,000 accurate copies, involving thousands of dollars;

(4) The manner in which the defendant first was suspected was its successive disclosures;

(5) The fraudulent and secret concealment of the defendant of all its possessions so that the complete details thereof would not be discovered or ascertained by an audit;

(6) The fact of fraudulent conduct of the defendant making an audit by failing to make disclosures that would have shown all the embezzlements at the time;

(7) The knowledge of the defendants that the embezzler was present during the audit and the retention by the defendant of the general relevant matter until after it knew of this fraud;

(8) The details of the later discovered embezzlements and the manner in which the embezzler successfully and successfully concealed detection thereof;

(9) The inadequacy of the embezzlement; and

(10) The reason why a copy of the insurance bond or contract is not set forth in the bill of complaint;"

The prayer for relief in the bill of complaint in the instant case is for a decree finding that the complainant is entitled to a rescission and cancellation of

the receipt or endorsement upon the policy of insurance; that the complainant is entitled to a discovery concerning the policy of insurance; that the complainant be entitled to surcharge and falsify the account and items of account and claim for loss as heretofore presented to the defendant; that the account be restated, and that the amount be found that is due to the complainant; that the complainant be granted the right to proceed before a jury in this cause, and secure a verdict for the additional amount so adjudged to be due from the insurer by reason of the newly discovered defalcations, or that the complainant be granted a decree enjoining the defendant from pleading in any court of law the several matters of defense set forth in its bill of complaint.

In the opinion of this court in the former case, above referred to, this court said: "The relief prayed for is predicated on the theory of the mutual mistake of fact at the time the alleged settlement of September 1, 1931, was made, and the bond surrendered and cancelled."

This court, also, said in that case, "the bill does not allege facts sufficiently showing that said settlement of September 1, 1931, was made under such 'mutual mistake' of fact as would entitle complainant to rescind said settlement and have restored to it the original bond which was then surrendered and cancelled. (Duff v. Hutchinson, 10 N.Y. Supp. 857, 859; Brooks v. Hall, 36 Kans. 697,699.)

"It rather appears from the bill, that the mistake

the receipt or endorsement upon the policy of insurance; that the complainant is entitled to recovery concerning the policy of insurance; that the complainant be entitled to surcharge and falsify the account and items of account and claim for loss as heretofore presented to the defendant; that the account be restated, and that the amount be found that is due to the complainant; that the complainant be granted the right to proceed before a jury in this cause, and secure a verdict for the additional amount so adjudged to be due from the insurer by reason of the newly discovered defalcations, or that the complainant be granted a decree enjoining the defendant from planning in any suit of law the several matters of defense set forth in the bill of complaint.

In the opinion of this court in the former case, above referred to, this court said: "The relief prayed for is predicated on the theory of the actual mistake of fact at the time the signed settlement of September 1, 1931, was made, and the book surrendered and cancelled."

This court, also, said in that case, "The bill does not allege facts sufficiently showing that said settlement of September 1, 1931, was made under such 'actual mistake' of fact as would entitle complainant to rescind said settlement and have restored to it the original book which was then surrendered and cancelled. (Wall v. Hinkelmann, 10 N.Y. Supp. 897, 898; Brooks v. Hall, 32 Ann. 691,693.)

"If neither ignorance from the will, nor the mistake

was alone complainant's, or that of the accountant employed by it, in carelessly checking up the defalcations of Timmons prior to the settlement. And it is the law that relief will not be granted in equity on the ground of the mistake of fact to a party where that mistake was induced or caused by his own carelessness or negligence. (12 Corpus Juris, p. 353, Sec 51; Dampmann v. Schulting, 75 N.Y., 55, 64; Steinmeyer v. Schroeppel, 226 Ill. 9, 13.)"

We think that a careful analysis of the present bill demonstrates that the relief prayed for is sought, legally considered, solely on the ground of a mutual mistake of fact, which is the same relief prayed for in the former case. Then, too, the record shows that the parties, the subject-matter, and the general purpose of both bills are identical. The very items making up the additional defalcations are, with one immaterial exception, the same. Also, both bills show that the alleged additional defalcations were all known to the complainant, either as the result of an examination of the books, or by the confession of Timmons himself, before July 1, 1923, that is, before the complainant filed its original bill in the Circuit Court on July 24, 1923. And, further, every material statement of fact set up in the present bill of complaint was known to it, or available, at the time of instituting the former action.

In Tilley v. Bridges, 105 Ill. 336, the court, citing with approval Hanna v. Read, 102 Ill. 396, used the following language:

was alone sufficient, or that the assignment was upheld by it, in carelessly choosing to the contentions of Timmons prior to a settlement. [illegible] relief will not be granted in equity on the grounds of the mistake of fact to a party where that mistake was induced or caused by its own carelessness or negligence. (2 Corpus Juris, p. 142, cno 31; Kennedy v. Schilling, 73 N.Y., 55, 64; Stalnaker v. Bartscher, 66 Ill. App. 13.)

We think that a careful analysis [illegible] bill demonstrates that the relief sought for is equitable, legally sufficient, solely on the ground of a mutual mistake of fact, which is the same relief sought for in the former case. Then, too, the court erred when the pleadings, the subject-matter, and the material evidence of both bills are identical. The very [illegible] of the additional defalcations are, with one insignificant exception, the same. Also, both bills are due the alleged wrongful [illegible] were all chargeable to the complainant, subject to the result of an examination of the books, or by the confession of Timmons. [illegible] and 1 Ill. App. [illegible] [illegible] and full [illegible] original bill [illegible] 36, 1896. [illegible] further, every material [illegible] of fact set up in the present bill of complaint [illegible] or avoidance, at the time of [illegible].

In Miller v. Holmes, [illegible] Ill. App. [illegible], [illegible] dealing with [illegible] Lewis v. Ward, 114 Ill. [illegible], [illegible] following [illegible]

"Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue on a subsequent suit between the same parties, its determination in the former suit, if properly presented and relied upon, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by defendant as matter of defense."

In the Tilley case, the court said:

"But the fact that different relief is claimed under the two bills can make no difference. The allegations in each bill are substantially alike, and all the relief claimed under the present bill could as well have been granted under the former bill."

In Mahannah v. Mahannah, 292 Ill. 133, the court held, citing the Tilley case, that when some specific fact has been decided in a former suit and is again put in issue, its determination in the former suit is conclusive, whether the cause of action is the same in both suits or not. And then, in Chicago Terminal R. R. Co. v. Barrett, 252 Ill. 86, Mr. Justice Cartwright said:

"When a court having jurisdiction decides a controversy, the question involved is settled forever between the parties to the suit and persons in privity with them, and neither can again litigate with the other any fact or question actually or directly in issue which was passed upon and determined by the court. Hanna v. Read, 102 Ill. 596; Tilley v. Bridges, 105 id. 336; Wright v. Griffey, 147 id. 496; Union Pacific Railway Co. v. Chicago, Rock Island and Pacific Railway Co., 164 id. 88; Dempster v. Lansingh, 244 id. 402; People v. Chicago, Burlington and Quincy Railroad Co., 247 id. 340."

Waller v. River Forest, 259 Ill. 283, holds that even though a decree in a former case is erroneous, it is

"Where some specific fact or question has been adjudicated and determined in a former suit, and the same fact or question is again put in issue on a subsequent suit between the same parties, its determination in the former suit, if properly presented and is tried upon, will be held conclusive upon the parties in the latter suit, without regard to whether the cause of action is the same in both suits or not. This doctrine of estoppel is known in the law as an estoppel by verdict, and is equally applicable to a mixed verdict in support of the action, when the counterclaim against it, as when offered by the defendant as matter of defense."

In the Bailey case, the court said:

"But the fact that different rights are claimed under the two bills was not to affirmance. The allegations in each bill, to substantially alike, and all the relief sought under the second bill could have well been granted under the first bill."

In Schumann v. Schumann, 98 Ill. 164, the court held, citing the Bailey case, that when a specific fact has been decided in a former suit and is again put in issue, its determination in the latter suit is conclusive, whether the cause of action in the suits be alike or not. And then, in Chicago Terminal R. R. Co. v. Barrett, 247 Ill. 86, Justice Carter said:

"Under a court having jurisdiction rendering a conclusive, the question is raised in several jurisdictions between the parties to the suit and persons in privity with them, and neither can a stranger with the other any good or question [illegible] in issue which was passed upon and determined by the court. Lucas v. [illegible], 130 Ill. [illegible]; Bailey v. Sprague, 156 Ill. 328; Talbot v. Bailey, 167 Ill. 490; Chicago Municipal Railway [illegible] v. [illegible], 182 Ill. [illegible]; Chicago Railway Co., 182 Ill. 497; Chicago v. Lundquist, 224 Ill. [illegible]; Chicago [illegible] v. Railway Co., 247 Ill. 340."

Bailey v. Sprague, 156 [illegible] 328, [illegible] that even though a decree in a former case is incorrect, it is

binding upon the parties "to that proceeding until it is reversed in a direct proceeding." Citing Young v. Lorain, 11 Ill. 624; Bradish v. Grant, 119 id. 606; Chicago Terminal Railroad Co. v. Barrett, 253 id. 86; Sielbeck v. Grothman, 248 id. 435; Denk v. Fiel, 249 id. 424.

In Wright v. Griffey, 147 Ill. 496, the court said,

> "Where the former adjudication is relied upon as an absolute bar to a subsequent action, it must be shown that the cause of action and thing to be recovered are the same in both proceedings. While the particular form of action may not be important, there must be, as is generally laid down, as between the two actions, identity of parties, of subject-matter and of cause of action, to constitute the first a bar to the second. Where, however, some controlling fact or question material to the determination of both of the causes has been adjudicated in the former suit by a court of competent jurisdiction and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not."

In Knowlton v. Manburg, 117 Ill. 471, the court quoted with approval the following language from Story's Equity Jurisprudence, Sec. 1523.

> "A former decree in a suit in equity between the same parties and for the same subject-matter, is also a good defense in equity, even although it be a decree merely dismissing thebill, if the dismissal is not expressed to be without prejudice."

In stating the reason for that principle, the court said in the Knowlton case,

> "The law very properly gives every man a day in court, but litigation ought not to be encouraged, and when a matter has once been litigated and decided by a court of competent jurisdiction, that matter cannot again be brought into litigation between the same parties, but the judgment or decree first rendered will be held conclusive between the parties."

holding upon the pleadings the first proceeding must be a mere nullity. Jurisdiction Kansas v. Colorado, 206 U.S. 46; Hendricks v. Gaines, 117 Ga. 699; Kansas Pacific Railroad Co. v. Mihlman, 22 Kan. 67; Hickman v. Alexander, 248 Ga. 455; Ford v. Ford, 241 Ga. 494.

In Dobbs v. Griffin, 187 Ga. 46, the court said,

> "Where the foreign adjudication is relied upon as an affirmative bar to a subsequent action, it must be shown that the issue of fraud was raised by the pleadings in the court in which proceeding. While the particular form of action may not be important, there must be, as is generally held, a trial on the merits between the two actions, identity of parties or privies, identity of subject-matter and of cause of action, in contradistinction to the first as to the second. Stare, supra, and cases cited. Moreover, there must be a judgment that is conclusive, showing that the determination of both of the causes has been adjudicated in the former and by a court of competent jurisdiction. Any fact or ground of defense in a suit or proceeding in a court of competent jurisdiction in the first suit, if necessarily involved, is conclusive of the same question in the later suit, irrespective of whether the cause of action in the suit in which it is raised is the same or not."

In Dowling v. Hughes, 117 Ga. 471, the court quoted with approval the following language from Cooley's Torts, 2nd ed.

> "A tresspasser who is . . . sued in another jurisdiction for the same trespass and has been found guilty, is also a good defense in equity, even although it be a course wholly direct-in-law-that, if the claimant in such case seeks to . . . without prejudice."

In ruling the issues in this case, we must bear in mind the Dowling case.

> "The law very properly, perhaps, does not deny in court, but litigation must not be an endless, and when a matter has once been litigated and decided by a court of competent jurisdiction, that matter cannot again be tried in any tribunal between the same parties, or the judgment or decree first rendered will be held conclusive between the parties."

For the complainant, the following cases are cited in opposition: Kenealy v. Glos, 241 Ill. 15; Gage v. Ewing, 114 Ill. 15; Farwell v. Great Western, 161 Ill. 522. None of these cases, however, holds to the contrary. In the Kenealy case, which was a suit in equity to cancel a tax deed, the court held that a decree in a former suit dismissing the bill for want of equity, was not res adjudicata, owing to the fact that it was not alleged in the original bill that the plaintiff was either in possession or had title to the property. In distinguishing that case from the Tilley case (supra), the court said:

> "An adjudication that appellee had no such title or possession as was required to maintain the bill, is not a determination of that fact that will estop appellee from setting up a title and possession subsequently acquired, even though in other respects the averments of the bills are substantially the same."

In the instant case, however, as we have already said, the same situation of facts existed when the first bill was filed as when the second bill was filed; and, to use apt language of the Tilley case, "All the relief claimed in the present bill could as well have been granted under the former bill." We do not find that any of the cases cited for the complainant holds contrary to the doctrine of the Tilley case.

In In re Northwestern University, 206 Ill. 64, the court said:

> "As said in Rogers v. Higgins, 57 Ill. 244, a controversy cannot be reopened to hear additional reasons which before existed and were within the knowledge of the party, in support of the same cause of action. The principle of

For the complainant, the [illegible] means are stated in opposition: [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]. None of these cases, however, [illegible] to the [illegible], in the [illegible] case, which was a [illegible] to [illegible] a bar dead, the court held that a decree in a foreclosure dismissing the bill for want of equity, was not [illegible]. Owing to the fact that it was not alleged in the original bill that the plaintiff was either in [illegible] or had title to the property. In distinguishing that case from the [illegible] case (supra), the court said:

> "An adjudication that complainant had no equity or title or connection or was required to maintain the bill, is not a determination of such fact that will estop plaintiff from suing on a title and possession subsequently acquired, even though it may reasonable the attention of the bill and substantially the same."

In the instant case, however, as we have already said, the same situation of facts existed when the first bill was filed as when the second bill was filed; and, to use the language of the [illegible] case, "All the equity [illegible] in the present bill could as well have been [illegible] in the bill." We do not find any of the [illegible] complainant's claim contrary to the decisions of the [illegible].

In [illegible] v. [illegible], [illegible] Ill. [illegible], the court said:

> "[illegible] in [illegible] v. [illegible], [illegible] Ill. [illegible], [illegible] contemporary counsel be [illegible] to [illegible] additional [illegible] which [illegible] [illegible] within the knowledge of the [illegible], in a [illegible] of the same owner of action. The [illegible]

> res adjudicata embraces not only what actually was determined in the former case, but also extends to any other matter properly involved and which might have been raised and determined in it."

And in that case the court quoted, with approval, from Beloit v. Morgan, 7 Wall. 619, the following:

> "The principle of res adjudicata reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented."

We are not unmindful of the fact that as a result of this decision theinsured will not get to the full what it actually contracted for, and that theinsurer may escape from a part of its normal contractual obligations, but the law of res adjudicata, which is said to be a rule of justice, based upon public policy and the principle that one should not be twice vexed for the same cause, is fixed, and is as potent in a court of equity as in one of law. Accordingly, the matters here involved having been settled by the regular processes of the courts in the former suit, it follows that they are not now a legitimate and available subject for further consideration and adjudication.

Bearing in mind, therefore, the issue in the former case, we are constrained to hold that although the pleader in the present case has undertaken to use similar facts, with immaterial additions, and has varied the prayer for relief, the two proceedings, in theeyes of the law, seek the same result, and are, in substance, as matters of litigation, identical; from which it follows that the

> *ius adjudicata* embraces not only what actually was determined in the former case, but also ea- tenus as any other matter properly involved and which might have been raised and determined in it."

And in that case the court quoted, with approval, from Malott v. Hawkins, 7 Kan. 633, the following:

> "The principle of *res adjudicata* reaches further. It extends not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defense which might have been but were not presented."

We are not unaware of the fact that as a result of this decision statutory will not get to the full what is actually contracted for, and that a consumer may assume from a part of its normal contractual obligations, but the law of *res adjudicata*, rather is said to be a rule of justice, based upon public policy and a principle that one should not be twice vexed for the same cause, in time, and to be taken in a court of equity as in one of law. Accordingly, the matters here involved having been settled by the regular processes of the courts in the former suit, it follows that they are not now a legitimate and available subject for further con- sideration and adjudication.

Bearing in mind, therefore, the issue in the former case, we are constrained to hold that although the plaintiff in the present case has undertaken to use similar facts, and invoke constitutional and has varied the origin for relief, the two proceedings, in essence of the law, and the same result, namely, to substance, an injunction of litigation, identical; from which it follows that the

principle of *res adjudicata* applies, and as a consequence, the decree of the Chancellor must be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

principle of the relativity applies, and as a consequence, the degree of the discoloration must be attributed.

ATTENDED.

THOMSON, P.J. AND O'BRIEN, J. OPTICS.

398 - 30151

RALPH H. BEESLEY, doing business as Ralph H. Beesley & Company, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
ROY C. BUNCH, Appellee,	240 I.A. 663

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On September 2, 1924, a judgment by confession on a promissory note was entered in the Municipal court for $340.00, in favor of the plaintiff, Ralph H. Beesley, doing business as Ralph H. Beesley & Co., against the defendant, Roy C. Bunch. Upon a motion to vacate, supported by an affidavit, the judgment was vacated, and it was ordered that the affidavit stand as an affidavit of merits. The affidavit set up that the note sued upon was given to the plaintiff as earnest money on a real estate sales contract signed by the defendant as purchaser and that before the contract was signed by the owner of the property, the defendant had orally withdrawn his offer to purchase. There was a trial before the court, without a jury, and a judgment for the defendant.

The defendant testified that he was a yard-master for the Chicago & Northwestern Railroad; that he got acquainted with the plaintiff through an advertisement of a

RALPH E. BEVERLY, doing business
as Ralph E. Beverly & Company,

Appellant,

v.

ROY O. HUGGS,

Appellee.

Opinion filed Jan. 30, 1936.

Appeal from Tazewell County; the Hon. [illegible] presiding.

Mr. JUSTICE TAYLOR delivered the opinion of the court.

On September 4, 1934, a judgment by confession was entered on a promissory note executed in the Tazewell County Court for $[illegible], in favor of the plaintiff, Ralph E. Beverly, doing business as Ralph E. Beverly & Co., against the defendant, Roy O. Huggs. Upon a motion to vacate, supported by an affidavit, the judgment was vacated, but it was ordered that the defendant plead to the affidavit of merits. The [illegible] motion showed [illegible] given to the plaintiff an account [illegible] which [illegible] claims could be claimed by the plaintiff as [illegible] that before the [illegible] was signed by the [illegible] property, the defendant was orally [illegible] to purchase. There was a trial [illegible] a jury, and a judgment for the [illegible].

The defendant testified that he was [illegible] for the plaintiff's representative, [illegible] qualified with the plaintiff's [illegible] an observation of a

piece of property the plaintiff had for sale; that his wife went to see the property; that she saw one of the plaintiff's agents; that on the day he, the defendant, signed the contract and note, he saw one Paupa, of the plaintiff's office; that Paupa said, "If this deal does not go through, we will return the papers," and that he, Paupa, would let him, thedefendant, know that night; that at the time the contract was drawn up, he told Paupa he would give $7750.00; that Paupa said the price was $8,100.00; that he, also, said, "I don't think they will take that but nevertheless, I will go and see what I can do with the owners and will let you know tonight;" that Paupa did not let him know that night; that the following morning he, the defendant, went to the plaintiff's office and asked Paupa what success he had had; that Paupa said, none at all, that Paupa, further, said, "I stayed until 10;30 and tried to talk him into it, but he wouldn't take it;" that he said the house cost him more than that, and he left him; that he, the defendant said to Paupa, "Call the deal off;" that Paupa said, "It is a good place, a wonderful buy;" that he, the defendant, said he did not care for it and would just as soon not have it, and walked out. He further testified that the next morning he went to Beesley's office and talked with Breda, also one of plaintiff's agents; that Breda said that as he, the defendant, had signed the note he must pay it; that he, the witness said, "I came in here yesterday morning and told Mr. Paupa to call the deal off, I didn't want it;" that Breda said, "I know, ten minutes after you was here they came in and signed it;" that he, the witness, said, "Why did you let him sign it," and Breda said, "Well, there was no restriction to us. We didn't

piece of property the plaintiff has for sale; that she wile want to see the property; that she saw one of the plaintiff's agents; that on the day the defendant signed the contract and note, he was one among, of the plaintiff's office; that Pauga said, "If this deal does not go through, we will return the money," and that he, Pauga, would let him, that defendant, know just slightly that at the time the contract was drawn up, he told Pauga he would give $2750.00; that Pauga said the price was $3,100.00; that he, also, said, "I don't think they'll take that but nevertheless, I will go and see what I can do with the owners and will let you know tonight;" that Pauga did not let him know that night; that the following morning, the defendant, went to the plaintiff's office and asked Pauga what success he had had; that Pauga said, more or all, that Pauga, further, said, "I argued until 10:00 trying to talk him into it, but he wouldn't take it;" that he said the house cost him more than that, and he left that he, the defendant said to Pauga, "Will the deal off;" that Pauga said, "It is a good place, a wonderful buy;" that he, the defendant, said he did not care for it but wanted just as soon not have it, and walked out. He further testified that the next morning he went to Pauga's office and talked with Frank, also one of plaintiff's agents; that Frank said that so he, the witness, had signed the note he must pay it; that he, the witness said, "I was in here yesterday morning and told Mr. Pauga to call off, I didn't want it;" that Frank said, "I know, the witness after you was here they came in and argued it;" that he, the witness, said, "Why did you let him talk it;" and Frank said, "Well, there was no [illegible]

have to deliver to you until thirty, sixty days, any time;" that he asked Breda to let him see the contract and note; that Breda went and looked for it and then said, "It is not in the office now, somebody has got it out;" that the note was evidence of the earnest money; that the note was the only consideration he gave.

The defendant rested at the close of the defendant's, Bunch's, testimony. The plaintiff then called Paupa as a witness. He testified that he was an employee of the plaintiff; that he met the defendant and his wife on August 10, 1924; that on August 13, the defendant came to the plaintiff's office and executed the contract and the note; that the evening of that day, after the contract and the note had been signed, he, the witness, wentto the home of the seller, Pemoller; that he was not in, but Mrs. Pemoller signed the contract and the next morning, about nine o'clock, the defendant called on the witness and asked, "How about the building?" that he, the witness, answered, "Mrs. Pemoller signed up but I couldn't get him to sign up because he didn't get home until late, and I didn't want to leave the contract there, and I took her signature on that contract and went back there, and I says, 'I am going over tonight and he will sign it,' and he went out of the office and that was all there was to it;" that the defendant did not tell him that morning to call the deal off; that he did not tell the defendant that Mr. Pemoller would not sign the contract; that on the evening of August 14, he took the contract to Pemoller's house, and Mr. Pemoller signed it, and at no time did the defendant tell him to call the deal off.

have to delivery to the usual [illegible], [illegible] that he asked Brown to let the [illegible] that Brown was not looked the [illegible] not in the office now, [illegible] note was evidence of the [illegible] the only consideration he [illegible].

The [illegible] Brown's, testimony. The [illegible] witness. He testified that he was in employ of the [illegible] 1923; that he was [illegible] on August 10, 1924; that on August 13, the [illegible] to the [illegible] office was occupied the [illegible] the evening of that day, [illegible] had been signed. So, the witness, [illegible] seller, Lenoiler; that he [illegible], but [illegible] signed the contract [illegible], the defendant called on the witness [illegible] building" that he, [illegible], [illegible] signed up but I wouldn't [illegible] get home until late, [illegible] there, and I took her [illegible] there, and I says, I'm going over [illegible] it,' and he said [illegible] was to it; that he [illegible] to call the real est[illegible] that Mr. Lenoiler [illegible] evening of August 13, he [illegible] house, and Mr. [illegible] delivered [illegible].

Breda, the sales manager of the plaintiff, called on behalf of the plaintiff, testified that on August 18 or 19, he had a conversation with the defendant at the plaintiff's office, and that on that occasion the defendant said, "You can call the deal off;" that he, the witness, asked him about the matter, and he, the defendant, said that he had bought another building; that he, the witness, said, "Well, you can't call this deal off, the entire deal, or contract is signed up by the seller, you will have to go through with it or forfeit the $300 note that you have put up;" that the defendant said, "No, I would not do that," and asked for the note; that he, the witness, then went and asked the cashier for the note; that the cashier said she didn't have it, that Mr. Paupa, who was out of the office at that time, had it, and he so told the defendant.

The note and contract were both offered in evidence; the note was dated August 13, 1924, and was for the sum of $300.00, payable on or before two days after date, to the order of Ralph H. Beesley & Co. at its office. It was signed, Roy C. Bunch. The contract was dated August 13, 1924, and signed by Roy C. Bunch, John Pemoller and Elsie Pemoller. The contract was to the effect that Roy C. Bunch agreed to purchase and John and Elsie Pemoller agreed to sell, for $7750.00 certain real estate at 5103 Dakin street, Chicago, Illinois. The contract recited that the purchaser had paid $300 as earnest money to be appliedon the purchase when consummated, and agreed to pay $2700 within five days after the title had been found to be good. It also provided for

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Mrsdu, the salon manager of the plaintiff, called on behalf of the plaintiff, testified that on August 18 or 19, he had a conversation with the defendant at the plaintiff's office, and that in that conversation the defendant said, "You can call the deal off;" that he, the witness, asked him about payment, and he, the defendant, said that he had bought another building; that he, the witness, said, "Well, you don't call this deal off, the entire deal, or contract is signed by the owner, you will have to go through with it or forfeit the $500 note that you have put up;" that the defendant said, "No, I would not do that," and asked for the note; that he, the witness, then went and asked the owners for the note; that the owners said she didn't have it, that Mr. Kaye, was out of the office at that time. That is, and he told the defendant.

The note and contract were both offered in evidence; the note was dated August 17, 1924, and was for the sum of $500.00, payable on or before two days after date, to the order of John A. Beasley & Co. at his office. It was signed, Roy C. Smith. The contract was dated August 17, 1924, and signed by Roy C. Smith, John Beasley and Elsie Smith. The contract was to the effect that Roy C. Smith agreed to purchase the John and Elsie Beasley property "at cost", for $17500.00 certain [illegible] Main street, Chicago, Illinois. The contract recited that the property had cost $500 on account money to be at Elsie the purchase when accepted, and agreed to pay $17000 within five days after the title had been found to be good. It also provided for

the assumption of a certain mortgage of $2800.

The contract contained the following:

> "Should said purchaser fail to perform said contract promptly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be retained by the vendor as liquidated damages, and this contract shall thereupon become and be null and void. * * * This contract and the said earnest money shall be held by Ralph Beesley & Co. for the mutual benefit of the parties concerned, * * * and it shall be the duty of said Ralph H. Beesley & Co. in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor, by his agent in said matter; and second, to the payment to vendor's broker of a commission * * * for his services in procuring this contract, rendering the over-plus to the vendor."

The trial judge held, as a proposition of fact, that according to the evidence, the sellers of the property had accepted the offer of the defendant, Bunch, before any notice was received by theagent of the seller that the defendant, Bunch, desired to call the deal off, and held, as a matter of law, that the party holding the legal title to a bill or note might sue on it, although he was merely an agent and liable to account to another for the proceeds of the recovery, but refused to hold that the legal title to the note in question was in the payee, Ralph H. Beesley, doing business as Ralph H. Beesley & Company, and accordingly, entered judgment for the defendant.

First. The question arises whether the finding of the trial judge that the sellers of the property had

the assumption of a certain authority at law.

The contract contained the following:

> "Should said purchaser fail to perform said contract properly on his part, at the time and in the manner herein specified, the earnest money paid as above, shall, at the option of the vendor, be retained by the vendor as liquidated damages, and this contract shall thereupon become null and void. * * * This contract and the said earnest money shall be held by Ralph Beasley & Co. for the mutual benefit of the parties concerned, * * * and it shall be the duty of said Ralph C. Beasley & Co. in case said earnest money be retained as herein provided, to apply the same, first, to the payment of any expenses incurred for the vendor, by his agent in said matter; and second, to the payment to vendor's attorney of a consideration * * * for his services in procuring this contract, rendering the over-plus to the vendor."

The trial judge held, as a proposition of law, that according to the evidence, the heirs of the property had assigned the title to the defendant, Wood, before any notice was served by tenant of the letter that the defendant, Wood, desired to sell the land, and held, as a matter of law, that the only valid and legal title to a bill of more right was on it, although he was merely an agent and liable to account to vendor for the proceeds if he recovers, not entitled to hold over the legal title to the rule in question was in the appellant C. Beasley, doing business as Ralph C. Beasley & Company, and some time, earnest payment for the property.

First. The question arises whether the finding of the trial judge that the ex-term of the property had

accepted the offer of the defendant before it was withdrawn, is clearly against the manifest weight of the evidence. That question, we are constrained to answer in the negative. The testimony was conflicting, that of the defendant, Bunch, being in conflict with the testimony of Paupa and Breda.

Paupa testified, positively, that, on the evening of August 13, the day on which the defendant signed the contract and the note, he went to the home of the seller, Pemoller, and that Mrs. Pemoller, her husband being away at the time, signed the contract, and that the next morning, the defendant called and asked him, the witness, "How about the building," and he, the witness, told him that Mrs. Pemoller had signed it, but that he was not able to get Pemoller to sign, as he didn't get home until late, and as he didn't want to leave the contract there, he had her sign it, and that he was going back again that evening, and that Pemoller would then sign it.

He further testified that the defendant did not tell him that morning to call the deal off; that on the evening of August 14, he, Paupa took the contract to Pemoller's house and he signed it; and at no time did the defendant tell him to call the deal off. The purport of Paupa's evidenace that the defendant did not withdraw his offer before it was accepted, is somewhat corroborated by the testimony of Breda, the sales manager.

Obviously, the answer to the question whether the defendant withdrew his offer in apt time, depends

accepted the offer of the defendant before it was withdrawn, is clearly against the preponderant weight of the evidence. That question, we are constrained to answer in the negative. The testimony was conflicting, that of the defendant, moreover, being in conflict with the testimony of Tempe and Hendo.

Tempe testified, positively, that, on the evening of August 13, the day on which the defendant signed the contract and the note, he went to the home of the plaintiff, Pemoller, and that Mrs. Pemoller, Doc Hubbard being away at the time, signed the contract, and that the next morning, the defendant called and asked him, the witness, "was about the building," and he, the witness, told him that Mr. Pemoller had signed it, but that he was not sure if Mr. Pemoller is sign, as he didn't get home until late, and he didn't want to leave the contract with him, he had her sign it, and that he was going back again that evening, and that Pemoller would then sign it.

He further testified that the defendant did actually tell that morning to call his deal off; that on the evening of August 14, he, Tempe took the contract to Pemoller's house and he signed it; and at no time did the defendant tell him to call the deal off. The contract Pemoller's evidence that the defendant did not withdraw his offer before it was accepted, is somewhat corroborated by the testimony of Hendo, the sales manager.

Obviously, the answer to the question whether the defendant withdrew his offer in ept time, depends

upon the credibility of the defendant, on the one hand, and Paupa and Breda on the other. And as to that subject, the trial judge was in a very much better position than we are. He had the witnesses before him, and was far better able in such a case as this, to pass judgment on the proper credit to be given to each of the witnesses than we are.

It follows, therefore, considering what the record shows on the subject of the alleged withdrawal of the offer, that the finding of the trial judge that the sellers of the property had accepted the offer of the defendant before any notice was received by the agent of the sellers that the defendant desired to call the deal off, is not against the manifest weight of the evidence.

Second. The question then remains, was the plaintiff, Ralph H. Beesley & Co., entitled to sue upon the note in question. That must be answered in the affirmative. The note was signed by the defendant, Roy C. Bunch and was payable to the order of Ralph H. Beesley & Co., at the office of Ralph H. Beesley & Co. Then, too, the contract of purchase provided that the earnest money should be retained by Ralph H. Beesley & Co., and that the proceeds should be paid out in a certain way, "first, to the payment of any expenses incurred for the vendor by his agent in said matter; and second, to the payment to vendor's broker of a commission * * * for his services in procuring this contract, and rendering the over-plus to the vendor."

upon the credibility of the defendants, on the one hand, and Runge and Staats on the other. And as to that subject, the trial judge was in a very much better position than we are. He had the witnesses before him, and was far better able in such a case as this, to pass judgment on the measure of credit to be given to each of the witnesses than we are.

It follows, therefore, considering what the record shows on the subject of the alleged withdrawal of the offer, that the finding of the trial judge that the buyer of the property had accepted the offer of the defendants before any notice was received by the agents of the sellers that the defendants desired to call the deal off, is not against the manifest weight of the evidence.

Second. The question then remains, was the plaintiff, Ralph H. Beasley & Co., entitled to sue upon the note in question. That must be answered in the affirmative. The note was signed by the defendants, Roy W. Bunch and was payable to the order of Ralph H. Beasley & Co., as the office of Ralph H. Beasley & Co. Then, too, the contract of purchase provides that the earnest money should be retained by Ralph H. Beasley & Co., and that the proceeds should be paid out in a certain way, "first, to the payment of any expenses incurred for the examining by his agents in said matter; and second, to the payment to the vendor's broker of a commission * * * for his services in procuring this contract, and procuring the execution of the conveyance."

The fact that it might turn out ultimately, as between the plaintiff and the seller that part of the proceeds of the note would have to be paid over to the seller, in no way affects the undoubted right of the plaintiff, the payee, to sue the defendant, the maker of the note. Trude v. Fulton, 207 Ill. App. 216.

This subject, generally, was considered by this court in Orner v. Liner, General Number 29880 (opinion filed October 28, 1935), but in that case the affidavit of merits, which had been stricken, recited that the vendor refused to carry out the sale, and we held that the facts as recited showed that no right of action arose in the agent until after the consummation of the sale. The instant case is distinguishable from the Orner case in that here the contention of the defendant that there never was a contract; that he withdrew his offer before a contract was made, was found to be untenable.

Inasmuch, therefore, as a valid and binding contract was actually made, and as the defendant had given the note in question as part of the consideration due from him under the contract, and as that note was payable directly to the plaintiff, it follows that the plaintiff in this proceeding is entitled to judgment against the defendant for the amount of the note and interest.

The judgment, therefore, will be reversed and judgment entered here in favor of the plaintiff and against the defendant for the sum of $340.00.

REVERSED AND JUDGMENT HERE.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

[illegible]

[illegible]

341 - 30194

AARON EGLITSKY,
Appellee,

v.

RUBIN BALLIS,
Appellant.

240 I.A. 663

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendant Rubin Ballis, from a judgment in the Superior Court in favor of the plaintiff, Aaron Eglitsky, in an action for trespass vi et armis. The verdict of the jury was for $1100.00, but, upon a remittitur of $500.00, and a judgment was entered in the sum of $600.00.

The declaration alleged that the defendant, on June 8, 1923, with force and arms, assaulted the plaintiff, and violently seized, and laid hold of him, and struck him with his fists and with a certain club, many violent blows on the body and head and then and there, with great force and violence, tore and damaged his clothing; and as a result he was greatly hurt, bruised and wounded and became sick, sore, and disordered, and so remained for a long time, and was thereby prevented from performing and transacting his affairs and duties; and was obliged to spend divers sums of money to be healed. The ad damnum was $25,000.00. The defendant filed a plea of the general

341 - 30136

AARON BRIGHTWAY,	
Appellee,	
v.	
ROBIN DANIEL,	
Appellant.	

Opinion filed Jan. 20, 1986.

MR. JUSTICE [illegible] delivered the opinion of the court.

This is an appeal by the defendant Robin Daniel, from a judgment in a Cumberland County in favor of the plaintiff, Aaron Brightway, in an action for trespass vi et armis. The verdict of the jury was for plaintiff, and, upon a remittitur of $500.00, a judgment was entered in the sum of $500.00.

The plaintiff alleged that the defendant, on June 8, 1985, with force and arms, assaulted the plaintiff, and violently seized, the land and at him, and drove him with his fists and with a garden club, many violent blows on the body and head and there and there, with great force and violence, bore and wounded in scorching and as a result he was greatly hurt, bruised and wounded and caused sick, sore and disordered, and to remain for a long time, and was thereby prevented from performing and transacting his affairs and business; and was compelled to spend divers sums of money to be healed. The ad damnum was $25,000.00. The defendant filed a plea of [illegible]

issue. The case was tried before the court, with a jury.

The evidence of the plaintiff is substantially as follows: He lived at 3437 West 12th Place, Chicago. He worked for the Model Dress & Cloak Company, of which he was president and a director. He received $65.00 a week for his services. He was 39 years old; five feet five inches in height, and weighed about 145 pounds. On Friday, June 8, 1923, between 3 and 4 P.M., he went with some samples to one Hoffman, one of his customers, to see him about getting an order. Ballis, the defendant, was in the business of manufacturing cloaks and suits, and had a store next to Hoffman's. When he, the plaintiff, got to Hoffman's place, the defendant called to him and said he wished to speak with him. He then went over, and the defendant said, "Why don't you pay me for your brother?" The plaintiff replied that what he guaranteed he would pay, but that he did not make any guarantee for his brother. Following that, the defendant called him an obscene name and struck him with his fist a blow on the left side of his face, which knocked him down. In falling, he struck an electric lighting post. He was unable to get up, but was helped up by one Basson, one of Hoffman's salesmen. He was dizzy and everything about him seemed dark. He was taken into Hoffman's store and was there for about an hour. His face was swollen and his clothes had gotten dirty from the sidewalk. The swelling lasted three or four days. From Hoffman's, he went to his office on West Roosevelt Road. He stayed there about three quarters of an hour, when one Shapiro took him home in his machine. About midnight, he

issue. The case was tried before the court, with a jury.

The evidence of the plaintiff is substantially as follows: He lived at 3857 West 18th Place, Chicago. He worked for the Model Dress & Mask Company, of which he was president and a director. He received $35.00 a week for his services. He was 38 years old, five feet five inches in height, and weighed about 145 pounds. On Friday, June 2, 1922, between 3 and 4 P.M., he went with some samples to one Hoffman, one of his customers, to see him about getting an order. Hollis, the defendant, was in the business of manufacturing cloaks and suits, and had a store next to Hoffman's. When he, the plaintiff, got to Hoffman's place, the defendant called to him and said he wished to speak with him. He then went over, and the defendant said, "Why don't you pay me for your overcoat?" The plaintiff replied that was a mistake, he had paid, but that he did not have any receipts for his brother. Following that, the defendant called him an obscene name and struck him with his fist a blow on the left side of his face, which knocked him down. In falling, he struck an electric lighting post. He was unable to get up, but was helped up by one Hanson, one of Hoffman's salesmen. He was dazed and everything about his senses left. He was taken into Hoffman's store and was seated in a chair an hour. His face was swollen and his clothes had gotten dirty from the sidewalk. The assailing lasted three or four days. From Hoffman's, he went to his office on West Monroe St. He stayed there about three quarters of an hour, when one Shapiro took him home in his machine. About midnight, he

called Dr. Halpert, who came about one o'clock and stayed with him until 5 o'clock. Dr. Halpert attended him four or five times, and then he called Dr. Bernstein. He did not work, on account of his illness, for two and a half months. For two months he suffered from dizziness, and his kidneys bothered him. He did not draw any salary for the two and a half months that he was away from his work. Up to the time he was assaulted, he had been in good health.

One Ossey was called by the plaintiff. He testified that, at the time in question, he was on the sidewalk near Hoffman's place of business at the time the defendant called the plaintiff over; that he did not hear what the defendant said; that he was not standing there when the plaintiff and the defendant were talking, as he had left to go to his store across the street; that he did not see the defendant strike the plaintiff. He further testified he now does business with the defendant, but not with the plaintiff, although prior to the time in question he used to do business with the plaintiff.

One Besser, called by the plaintiff, testified that he was a salesman at Hoffman's; that on the day in question, he saw the plaintiff at Hoffman's; that the plaintiff said he did not feel well; that he took him into the store and gave him some water; that the defendant was busy, and the plaintiff did not tell him about what had occurred; that he, the witness, did not see what took place; that he did not see any swelling of the face, and the plaintiff did not complain of being dizzy.

called Dr. Bigsert, who came about one o'clock and stayed with him until 5 o'clock. Dr. Bigsert attended him four or five times, and then he called Dr. Remington. He did not work, on account of his illness, for two and a half months. For two months he suffered from dizziness, and his kidneys bothered him. He did not draw any salary for the two and a half months that he was away from his work. Up to the time he was examined, he had been in good health.

One Geary was called by the plaintiff. He testified that, on the time in question, he was in the although his Hoffman's place of business at the time the defendant struck the plaintiff over; that he did not hear what the defendant said; that he was not standing where the plaintiff and the defendant were talking, as he had left to go to the store across the street; that he did not see the defendant strike the plaintiff. He further testified he saw there business with the defendant, but not with the plaintiff, shortly prior to the time in question he used to do business with the plaintiff.

One Weeper, called by the plaintiff, testified that he was a [illegible] of [illegible]; that on the day in question, he saw the plaintiff and defendant; that the plaintiff said he did not feel well; that he went into the store and gave him some water; that [illegible] hung, and the plaintiff did not [illegible] conversed; that he, the witness, did not see [illegible] place; that he did not see any [illegible] of the face, and the plaintiff did not complain of being dizzy.

Dr. Halpert, a graduate of Loyola University, who had practiced his profession for ten years, testified, that on the night in question, about one o'clock, he called on the plaintiff at his home, and examined him; that he found him in bed; that he found a swelling and bruises over the left side of the head and face, and, also, a contusion and black and blue marks over the left kidney; that the plaintiff seemed to be suffering excruciating pain in the region of the kidneys; that he injected morphine several times to stop the pain; that the left side of the head was black and blue; that he, the plaintiff, after that, called at his, the doctor's,office every week for about ten weeks.

Dr. Bernstein, a graduate of the University of Illinois, testified that the plaintiff was a patient of his, and called him on June 9, 1923; that he visited the plaintiff and found him in bed suffering from shock; that he had a subnormal temperature, rapid pulse and respiration; that he showed a contusion on the left side of the temple and several scratches on his face, and showed a very marked contusion or abrasion over the left kidney; that a test of the urine showed blood, a hemorrhage of the kidneys; that he saw the plaintiff on June 10, 11, 18 and 21. On cross-examination, he testified that the condition was permanent, and no treatment would be of any avail; that it appeared to him, the plaintiff had received an injury of some sort; that the plaintiff complained of headaches and dizziness, and that he diagnosed the case as one of concussion of the brain.

From the foregoing, it will be seen that the evi-

Dr. Halpern, a graduate of Loyola University, who had practiced his profession for six years, testified, that on the night in question, about one o'clock, he called on the plaintiff at his home, and examined him; that he found him in bed; that he found a swelling and bruises over the left side of the head and face, and, also, a contusion and black and blue marks over the left kidney; that the plaintiff seemed to be suffering excruciating pain in the region of the kidneys; that he injected morphine several times to ease the pain; that the left side of the head was black and blue; that he, the plaintiff, after that, called at his, the doctor's,office every week for about ten weeks.

Dr. Bernstein, a graduate of the University of Illinois, testified that the plaintiff was a patient of his, and called him on June 9, 1933; that he visited the plaintiff and found him in bed suffering from shock; that he had a subnormal temperature, rapid pulse and respiration; that he showed a contusion on the left side of the temple and several scratches on his face; and showed a very marked contusion or abrasion over the left kidney; that a test of the urine showed blood, a hemorrhage of the kidneys; that he saw the plaintiff on June 10, 11, 18 and 21. On cross-examination, he testified that the condition was permanent, and no treatment would be of any avail; that it appeared to him, the plaintiff had received an injury of some sort; that the plaintiff complained of headache and dizziness, and that he diagnosed the case as one of concussion of the brain.

From the foregoing, it will be seen that the evi-

dence for the plaintiff, taken by itself, quite sufficiently proves not only liability on the part of the defendant, but, also, that the verdict was not excessive.

The evidence of the defendant is that at the time and place in question, he said to the plaintiff, "You were good for your brother; why don't you pay me off;" that the plaintiff said, "I never was good for my brother," and then called the defendant an obscene name, and a liar; that then he, the defendant, with his open hand, slapped him on the left side of the face; that he did not knock him down, nor did he fall down; that he, the plaintiff, walked down the street without anyone helping him. He testified, further, that he weighed 218 pounds. Three witnesses, Bluestein, Ballis (a son of the defendant) and Sabath (employed by the Sherman Cloak Company, the company the defendant is connected with) corroborate the defendant and testified that they heard the plaintiff call the defendant an obscene name and a liar.

Interpreting the verdict for the plaintiff, it becomes obvious the jury did not believe the witnesses for the defendant. And the question arises whether there are such discrepancies and inconsistencies in the testimony, as it is disclosed in the record, that we must, considering it reasonably, conclude that it is manifestly against the weight of the evidence. As the defendant admitted the assault, the only question of fact before the jury, in reality, was the violence of the assault or blow, and its consequence. On that subject we think the evidence of the plaintiff and the two doctors, is quite persuasive; at least it would be un-

Dr. Halpern, a graduate of Loyola University, who had practiced his profession for six years, testified, that on the night in question, about one o'clock, he called on the plaintiff at his home, and examined him; that he found him in bed; that he found a swelling and bruises over the left side of the head and face, and, also, a contusion and black and blue marks over the left kidney; that the plaintiff seemed to be suffering excruciating pain in the region of the kidneys; that he injected morphine several times to ease the pain; that the left side of the head was black and blue; that he, the plaintiff, after that, called at his, the doctor's,office every week for about ten weeks.

Dr. Marcelin, a graduate of the University of Illinois, testified that the plaintiff was a patient of his, and called him on June 9, 1923; that he visited the plaintiff and found him in bed suffering from weak; that he had a subnormal temperature, rapid pulse and respiration; that he showed a contusion on the left side of the temple and several scratches on his face; and showed a very marked contusion or abrasion over the left kidney; that a test of the urine showed blood, a hemorrhage of the kidneys; that he saw the plaintiff on June 10, 11, 18 and 21. On cross-examination, he testified that the condition was permanent, and no treatment could be of any avail; that it appeared to him, the plaintiff had a certain injury of some sort; that the plaintiff complained of headache and dizziness, and that he diagnosed the case as an concussion of the brain.

From the foregoing, it will be seen that the evi-

dence for the plaintiff, taken by itself, quite sufficiently proves not only liability on the part of the defendant, but, also, that the verdict was not excessive.

The evidence of the defendant is that at the time and place in question, he said to the plaintiff, "You were good for your brother; why don't you pay me off;" that the plaintiff said, "I never was good for my brother," and then called the defendant an obscene name, and a liar; that then he, the defendant, with his open hand, slapped him on the left side of the face; that he did not knock him down, nor did he fall down; that he, the plaintiff, walked down the street without anyone helping him. He testified, further, that he weighed 213 pounds. Three witnesses, Bluestein, Ballis (a son of the defendant) and Sabath (employed by the Sherman Cloak Company, the company the defendant is connected with) corroborate the defendant and testified that they heard the plaintiff call the defendant an obscene name and a liar.

Interpreting the verdict for the plaintiff, it becomes obvious the jury did not believe the witnesses for the defendant. And the question arises whether there are such discrepancies and inconsistencies in the testimony, as it is disclosed in the record, that we must, considering it reasonably, conclude that it is manifestly against the weight of the evidence. As the defendant admitted the assault, the only question of fact before the jury, in reality, was the violence of the assault or blow, and its consequence. On that subject we think the evidence of the plaintiff and the two doctors, is quite persuasive; at least it would be un-

dence for the plaintiff, taken by itself, quite sufficiently proves not only liability on the part of the defendant, but, also, that the verdict was not excessive.

The evidence of the defendant is that at the time and place in question, he and [illegible] [illegible], "You are good for your business; why don't you pay me off?" that the plaintiff said, "I never [illegible] for my business," and then called the defendant an opprobrious name; and a fight then ensued, the defendant, with his open knife, slashed him on the left side of the face; that he did not knock him down, nor did he kick him; that he, the defendant, walked from the street without [illegible]. [illegible] testified, further, that he [illegible] his assailant. There is witnesses, Mrs. Smith, Willis ([illegible] of the defendant) and Smith (employed by the defendant [illegible]), who corroborate the defendant in [illegible] (the) occurrence as defendant and testified; but they bound the plaintiff and the defendant as observers [illegible] a fight.

Interpreting the verdict for the plaintiff, it becomes obvious the jury did not believe the witnesses for the defendant. And the question either [illegible] such discrepancies and inconsistencies in the testimony, or it is disclosed in the record, that on cross, [illegible] reasonably, conclude that it is [illegible] against the weight of the evidence. [illegible] the only question of fact [illegible] the violence of the assault or blow, [illegible] on that subject [illegible] the defendant, is quite [illegible]

reasonable for us, the question depending so much upon credibility, to hold that the verdict was clearly against the weight of the evidence.

If the jury, as to the injuries suffered by the plaintiff as the result of the assault, believed the testimony given for the plaintiff, which belief we cannot reasonably say was unjustified, then in our judgment, the verdict was not only not excessive, but erred, if anything, on the side of indulgence towards the defendant.

Beside the contentions as to liability and quantity of damages, which two we have already held to be untenable, it is urged, (1) that it was error to permit the plaintiff to testify that at the time of the assault he was getting $65.00 a week and that as long as he did not work he got no compensation, and that he did not work for two and one half months; and (2) that the court erred in giving an instruction on exemplary damages.

(1) It is contended that the court erred in permitting the plaintiff to testify that at the time of the assault he was working for the Model Dress & Cloak Company for $65.00 a week and that as long as he did not work, two and a half months, he got no salary; that the testimony was incompetent because no special damage was alleged in the declaration. The declaration alleged that the plaintiff became sick and remained so for a long time, during all of which time he suffered great pain "and was hindered and prevented from performing and transacting his affairs and duties." In Chicago and Erie R. R. Co. v. Meech, 163 Ill.305,

reasonable for us, the question remaining as much open credibility, to hold that the verdict was clearly against the weight of the evidence.

If the jury, as to the injuries suffered by the plaintiff as the result of the assault, believed the testimony given for the plaintiff, and it behoved us cannot reasonably say was unjustified, then in our judgment, the verdict was not only not excessive, but error, if anything, on the side of leniency towards the defendant.

Beside the contentions as to liability and amount of damages, which two we have already held to be unfounded, it is urged, (1) that it was error to permit the plaintiff to testify that at the time of the assault he was earning $25.00 a week and that as long as he did not work he got no compensation, and that he did not work for two and one half months; and (2) that the court erred in giving an instruction on economic damages.

(1) It is contended that the court erred in permitting the plaintiff to testify that at the time of the assault he was working for the Ladd Gear & Tool Company for $25.00 a week and that as long as he did not work, two and a half months, he got no money; that the contention was incompetent because no special damage was alleged in the declaration. The declaration [illegible] the injury became also [illegible] so for a long time, making his [illegible] which also he suffered great pain [illegible] and prevented from performing and transacting his affairs and duties." In Whiting and Ill. V. C. Co. v. Green, 188 Ill. 349,

the court said,

> "The rule deducible from the cases in this state is, that in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage, and that proof of his particular employment or business and of his ordinary wages or earnings therein is admissible in evidence under such general averment, but that when it is sought to recover for loss of profits, or earnings that depend upon the performance of a specialcontract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration."

Chicago Union Traction Co. v. Brethauer, 223 Ill. 521; Barnes v. Danville Street Ry. Co., 235 Ill. 566. Further, the record shows that the testimony, when elicited, was not objected to. Pass v. Briggs & Turivas, 231 Ill. App. 314. In our judgment, this contention is untenable.

(2) It is contended that the court erred in giving for the plaintiff an instruction on exemplary damages. The words complained of are the following:

> "And in case the jury believe from the evidence that the assault was wanton, reckless, or vicious, and uncalled for in its character, then the jury may add to such actual damages, if any such they find, such a sum as they may believe from the evidence would be reasonable and just, as smart money or punishment."

The record shows, however, that the court gave an instruction on the same subject, exemplary damages, at the request, also, of the defendant.

It is the law that where both sides ask the trial judge to instruct the jury on the question of exmplary damages and by so doing admit that such damages are involved, neither

the court said,

> "The rule deducible from the cases in this state is, that in order to recover compensation for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability, caused by the injury, and consequent loss and damage, and that proof of his particular employment or business and of his ordinary wages or earnings thereby is admissible in evidence under such general averment, but that when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or employment, then these special and particular damages, and the facts on which they are based, must be set out in the declaration."

Chicago Union Traction Co. v. Washburn, 223 Ill.

681; Haines v. Danville Street Ry. Co., 206 Ill. 266.

Further, the record shows that the testimony, when objected, was not objected to. Ibid. Haines v. Haines, 271 Ill. 420.

314. In our judgment, this contention is unfounded.

(3) It is contended that the court erred in giving for the plaintiff an instruction on exemplary damages. The words complained of are the following:

> "And in case the jury believe from the evidence that the assault was brutal, malicious, or violent, and unmerited for in the character, then the jury may add to such actual damages, if any such they find, such a sum as they may believe from the evidence ought to be reasonable and just, as exact money or punishment."

The record alone, however, that the court gave an instruction on the same subject, exclusively to, at the request, also, of the defendant.

It is the law that when both sides use the text judge to instruct the jury on the question of exemplary damages by so doing admit that such damages are involved, unless

side will be entitled to have it held that compliance therewith was error. Illinois Central R. R. Co. v. Latimer, 128 Ill. 163.

Finding no material error in the record, the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

side will be satisfied to see it held that conditions thereunder are proper. Illinois Central R. R. Co. v. Latimer, 130 Ill. 162.

Finding no material error in the record, the judgment will be affirmed.

Affirmed.

TOURNOR, P.J., and CARTWRIGHT, J., dissent.

350 - 30203

JAN KUSZEWSKI,

Appellee,

v.

PETER NOVAK,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 663

Opinion filed Jan. 20, 1926

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 11, 1921, the plaintiff, Jan Kuszewski, and the defendant, Peter Novak, entered into a written contract of exchange by which the plaintiff was to convey to the defendant the premises known as 1812 West Chicago avenue, at a value of $12,400.00, and the defendant was to convey certain premises to the plaintiff and pay to him, in addition thereto, $3400.00 in cash. The contract recites, in addition to the foregoing, the following: "Each party to this contract has signed a judgment note for $500.00 for the faithful performance of this contract." Pursuant to that provision, the plaintiff gave the defendant his note for $500.00, and the defendant gave the plaintiff his note for $500.00.

On September 9, 1922, the plaintiff filed a statement of claim and cognovit in the Municipal Court on the $500.00 note, which had been delivered to him by the defendant, and judgment was entered that day in favor of the plaintiff and against the defendant, in the sum of $594.25.

380 - 202.02

JAN KOSMEWSKI,

Appellee,

v.

PETER NOVAK,

Defendant.

Opinion filed Jan. 20, 1936

[illegible]

the court.

On March 12, 1931, the [illegible] and the [illegible], entered into a written contract of exchange by which the [illegible] to convey to the defendant the premises known as [illegible] avenue, in a value of $[illegible], and [illegible] was to convey certain property to the [illegible] by [illegible], in addition to [illegible] of $[illegible]. The contract [illegible]. In addition to the [illegible], the defendant [illegible] to this contract was signed a judgment note for [illegible] faithful performance of said contract." [illegible] that provision, the plaintiff gave the defendant [illegible] $600.00, and the defendant gave the [illegible] $600.00.

On December 9, 1931, the defendant filed [illegible] of claim and complaint in the [illegible] on the judgment note, which had been delivered to the [illegible] judgment was entered [illegible] against the defendant, in the sum of $[illegible].

On April 9, 1923, the defendant filed a petition alleging, among other things, that he had complied with all the provisions of the contract and was ready, willing and able to carry out his part of the contract, but that the plaintiff was not ready and did not carry out his part of the contract, and that the plaintiff conspired with the real estate broker, Placzkiewicz to obtain the judgment above mentioned. It was further alleged that the defendant had a good defense to the entire amount of the judgment. The prayer of the petition was that by reason of the fraudulent acts of the plaintiff and Placzkiewicz, the judgment be opened up and the defendant given leave to defend. On the same day, April 9, 1923, the judgment was opened up and a trial ordered, The order provided that the judgment should stand as security, and that the execution should be staid until the further order of the court; also, that the petition stand as an affidavit of merits for the defendant.

On July 9, 1924, an order was entered vacating the judgment by confession, and dismissing the suit for want of prosecution.

On October 9, 1924, an order was entered substituting Wm. A Sherwin as attorney for the plaintiff in place of Paul V. Pallasch.

On October 14, 1924, by agreement of the parties, an order was entered that the order of July 9, 1924, dismissing the suit for want of prosecution be vacated and set aside.

On April 9, 1[illegible], [illegible] filed a petition alleging, among other things, [illegible] with all the criminal [illegible] willing and able to carry out [illegible] but that the [illegible] was not truly and [illegible] any support of the contrary, and [illegible] compared with the real estate market, [illegible] the judgment above mentioned was. It was [illegible] that the defendant had [illegible] amount of the judgment. The [illegible] was that by reason of the fraudulent acts of the plaintiff and [illegible], the judgment be opened up and the defendant given leave to defend. On the same day, April 9, 1[illegible], the judgment was opened up [illegible] trial ordered, the order recited that the judgment should be vacated by agreement, and the execution [illegible] until the further order of the court; also, that the petition stand as an affidavit of merits for [illegible] trial.

On May 3, 1[illegible], the [illegible] filed a [illegible] the judgment by default, and discharged, [illegible] want of consideration.

On October 3, 1[illegible], an order was [illegible] vacating the [illegible] for [illegible] in place of [illegible] filed.

On October 11, 1[illegible], by agreement [illegible] an order was entered that [illegible] 3, 1[illegible], [illegible] vacating the [illegible] judgment [illegible] set aside.

On November 13, 1924, by agreement of the parties, the cause was submitted to the court for trial, without a jury.

There was a trial beginning on November 13, 1924, and a finding and judgment in favor of the plaintiff and against the defendant, in the sum of $594.35. This appeal is from that judgment. No brief has been filed for the plaintiff.

In our opinion, the evidence warranted setting aside the judgment and entering judgment for the defendant. The contract of exchange was made and the notes delivered pursuant thereto, and we think that the evidence affirmatively shows that the plaintiff was not entitled to recover.

It is claimed by the plaintiff that when the parties met to close the deal, it was found that the building, on the property the defendant had contracted to convey to the plaintiff, extended a foot or more over and on certain contiguous property belonging to one Thurbeck, and that although the defendant promised to furnish a plat and proof that the building did not overlap, he failed to do so, and as a consequence, after waiting a long time in vain, he, the plaintiff, confessed judgment on the note. It will be observed that the note was dated March 11, 1921, the date of the contract, and the judgment by confession was entered on September 9, 1922.

On the other hand, the defendant testified that he attended a meeting at which were present himself, the plain-

On November 13, 1924, by agreement of the parties, the cause was submitted to the court for trial, without a jury.

There was a trial beginning on November 13, 1924, and a finding and judgment in favor of the plaintiff and against the defendant, in the sum of $524.32. This appeal is from that judgment. No error has been cited for the plaintiff.

In our opinion, the evidence warranted nothing saide the judgment and entering judgment for the defendant. The contract of exchange was made and the notes therein literal payment thereto, and we think that the evidence affirmatively shows that the plaintiff was not entitled to recover.

It is claimed by the plaintiff that when the parties met to close the deal, it was to be that the mill land, on the property the defendant had agreeded to convey to the plaintiff, exceeded a foot or more over and on certain contiguous property belonging to one Turnbaugh and that although the defendant promised to [illegible] that the building did not overlap, he failed so to do, so a conference, after waiting a long time in vain, the plaintiff, nevertheless, delivered to the note. It will be observed that the note was dated June 1, 1921, the date of the contract, and the judgment by confession was entered on September 9, 1922.

On the other hand, the defendant testified that he attended a meeting at which were present also Mr. the plain-

tiff and Pallasch, attorney for the defendant, and that when Pallasch at that meeting said that defendant's building was partly over on the next lot, he, the defendant, told him that that was not the fact. The witness Pallasch, a real estate dealer, who was present at the meeting, which he says took place in April, 1921, when the deal was to be closed, testified that Thurbeck told him that the building extended over on his lot; that the defendant was then informed of that fact, but said that that was not so, and that he would furnish them a plat, Pallasch further testified that "he would furnish a plat, and then we were waiting for Mr. Novak to furnish a plat," which he has never done. He further testified, "We were preparing for the closing of the deal, but Mr. Novak was to furnish evidence that the building was not over on the lot;" that the defendant never furnished that evidence, and that the plaintiff was ready at all times to close the contract. There was put in evidence the testimony of one Bremer, a surveyor, and, also, a plat made by him of the property in question.

The plat shows that the building in question, which was a one-story brick theatre on the property known as Street Number 1820 West Chicago avenue, extends over west and, also, east of the lot line. Notations on the plat are as follows: "S.E. Corner of Brick Pier is 1' 3-7/8" W. & 1-7/8" N. of lot corner." "S.E. Corner of Brick Pier is 0-3/4" W. & 1-1/8" N. of lot corner."

The plaintiff testified that he was present at a meeting at which there were also present Pallasch, Novak and Garynski, at whose office the contract provided that the

Hill and Pallasch, attorney for the defendant, and then upon Pallasch at that meeting said that defendant's building was partly over on the next lot, he, the defendant, told him that that was not the fact. The witness Pallasch, a real estate dealer, who was present at the meeting, which he says took place in April, 1921, when the deal was to be closed, testified that Thurbeck told him that the building extended over on his lot; that the defendant was then informed of that fact, but said that that was not so, and that he would furnish them a plat. Pallasch further testified that "he would furnish a plat, and then we were waiting for Mr. Hovis to furnish a plat," which he has never done. He further testified, "we were preparing for the closing of the deal, but Mr. Hovis was to furnish evidence that the building was not over on the lot;" that the defendant never furnished that evidence, and that the plaintiff was ready at all times to close the contract. There was put in evidence the testimony of one Kramer, a surveyor, and, also, a plat made by him of the property in question.

The plat shows that the building in question, which was a one-story brick therein on the property above at street number 1820 West Ohio, to wit, extends over west and, also, east of the lot line. Corners on the plat are as follows: "A.", corner of brick pier in 1' 4-1/2" W. 6 inches N. of lot corner." "B.", corner of brick pier in 0-3/4" W. 2 1-1/2" N. of lot corner."

The plaintiff testified that he was present at a meeting at which there were also present Hovis, Hill and Carpenter, at which office the contract provided that the

negotiations should be closed; that he was ready to close the transaction at that time; that when he made the contract, he did not know that there was anything wrong with the building; that he told Pallasch to look the matter over as he did not wish to get into any trouble; that Pallasch then asked the defendant for a plat; that the defendant said he did not have it with him, and then Pallasch stated that under those circumstances they could not close the contract; that the defendant said he would bring it in on some other day, but never afterwards did so.

On cross-examination, the plaintiff testified that Pallasch represented him as his lawyer in the deal; that he himself did not know that the building was on some one elses land until a neighbor told him that it was on his lot; that he himself did not know whether the defendant's property overlapped some one elses property or not. He further testified that he did not give the defendant any notice, after waiting something over a year, before beginning suit, stating, also, that as to his own property, he had the abstract brought down to date.

The testimony of the defendant, when called in rebuttal, is to the effect that they sent him home to get some files and a lease; that he went to get them, and "when I got back again they told me everything is over. They ain't going to close the deal, and I asked him what is about the matter, and he said, 'well, everything is over. I can't make my arrangements to close the deal.'"

When the trial judge said, "I can't understand

negotiations should be closed; that he was ready to close the transaction a week later; that when he made the contract, he did not know that there was anything wrong with the building; that he told Pallesen to look the matter over as he did not wish to get into any trouble; that Pallesen then asked the defendant for a plan; that the defendant said he did not have it with him, and then Pallesen stated that under those circumstances they could not close the contract; that the defendant said he would bring it to me some other day, but never afterwards did so.

On cross-examination, the plaintiff testified that Pallesen represented him as his lawyer in the trail; that he himself did not know that the building was on some one place land until a neighbor told him that it was on his lot; that he himself did not know whether the defendant's property overlapped more one place rightly or not. On further testified that he did not give the defendant any notice, after waiting something over a year, before beginning suit, starting, also, that as to his own property, he was the absolute owner right down to date.

The testimony of the defendant, was confined in reinstatement, is to the effect that he was six times to get some plans and a lot of stuff he went to get done. He when I got back with him, did not everything in order. He ain't going to come to me. I, and I asked him, why is that the matter, and he said, "well, everything is okay. I could make my arrangement to close the deal."

When the trial judge said, "I will reinstate

why they didn't close the deal," the witness answered, "They didn't tell me why." "They didn't execute a written notice or anything - no nothing; and a week afterward I go to the lawyer's to close the deal, and he says, 'That deal is over you give trouble with him,' he tells me that day.'"

When Pallasch was called as a witness in rebuttal on behalf of the plaintiff, and asked why the deal was not closed, he testified, "On account I could not have no proof as to the situation of the building on the lot." and when asked the question, "Was there any other reason why this deal was not closed, other than the overlapping?" he answered, "Yes, those judgments and things in the letter from the Chicago Title & Trust Company." The latter refers to a letter dated March 24, 1921, sent by the Chicago Title & Trust Company to Carynski, the attorney, reciting that the examination of the title to the property in question showed that it was subject, among other things, to a lease by one Thurbeck on the premises in question.

The question arises whether the evidence shows that the defendant failed in "the faithful performance" of the obligations upon him, which were set forth in the written contract of exchange, and whether the plaintiff so complied with the requirements of that contract as to entitle him to recover on the $500.00 note in question. Although the plaintiff claimed that he was not in default and was ready to perform, nevertheless, the written contract put upon him

why they didn't close the deal," the witness answered. "They didn't tell me why." They didn't execute a written notice or anything - no contract, and I didn't demand it of the lawyer, to close the deal, as he says, 'that deal is over you also transmit it to me, he said to that day.'"

When Williams was called as a witness in behalf of the plaintiff, and asked why the deal was not closed, he testified, "We thought I could have no proof as to the situation of the building on the lot," and when asked the question, "Did there ever arise reason why this deal was not closed, other than the over-lapping?" he answered, "Yes, there was another reason in the letter from the Chicago Title & Trust Company." A letter referred to a letter dated March 26, 1921, sent by the Chicago Title & Trust Company to Hayward, the attorney, - citing that the examination of the title to the property in question showed that it was subject, among other things, to a lease by one Hardwood to the premises in question.

The question arises either from a mere clerical error that the letter was dated in "the fall" instead of the obligations was a lease, which appeared later in the written contract of exchange, or, was it a deliberate attempt to conceal the particulars of a contract in writing in order that he could recover on the ground that it was not signed, although the plaintiff claimed that he was ready to perform, nevertheless, the written contract was his

certain obligations which he was bound to fulfill before he was entitled to charge the defendant with failure to perform, and thereby obtain the right to recover on the note in question.

The contract provides that:

> "In case material defects be found in said title, and so reported, then if such defects be not cured within sixty days after such notice thereof, this contract shall at the option of the party delivering such objections become absolutely null and void; notice of such election to be given to the other party; but the party delivering such objections may nevertheless elect to take such title as it then is, and in such case the other party shall convey as above agreed; provided, however, that such party delivering such objections shall have first given a written notice of such election, within ten days after the expiration of the said sixty days and tendered performance hereof on his part. In default of such notice of election to receive such title and accompanying tender within the time so limited, the party delivering such objections shall, without further action by either party, be deemed to have abandoned his claim upon said premises and thereupon this contract shall cease to have any force or effect as against said premises, or the title thereto or any right or interest therein, but not otherwise.
>
> The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and the same may be served either upon the other party or his agent."

The evidence shows that no written notice of material defects was given to the defendant; that no notice of election to declare the contract void was given; that no written notice of election to take the title as it was, was given, from all of which it follows, applying the provision of the second sentence in the above quoted paragraph from the contract, that the plaintiff must "without further action by either party, be deemed to have abandoned his claim upon

certain obligations which he was bound to fulfill before he was entitled to abandonment accompanied with failure to perform, and thereby retain the right to recover on the note in question.

The contract provides that:

> "In case material defects or fraud in said title, and so reported, then it even matters be not cured within sixty days after such notice thereof, this contract shall at the option of the party delivering such objections become absolutely null and void; notice of such election to be given to the other party; but the party delivering such objections may nevertheless elect to take such title as it then is, and in such case the other party shall convey as therein agreed; provided, however, that such party delivering such objections shall have first given a written notice of such election, within ten days after the expiration of the said sixty days and tendered performance thereof on his part. In default of such notice of election to receive such title and accompanying abstract within the time so limited, the party delivering such objections shall, without further action by either party, be deemed to have abandoned his claim and all promises and stipulations of this contract shall cease to have any force or effect as against such claimant, or his title thereto, or any right or interest in said, but not otherwise.
>
> The notices required to be given by the terms of this agreement shall in all cases be construed to mean notices in writing, signed by or on behalf of the party giving the same, and may be served either upon the other party or his agent."

The evidence shows that no written notice of material defects was given to the plaintiff; that no notice of election to declare the contract null was given; that no written notice of election to take the title as it was, was given, from all of which it follows, applying the provision of the second section in the above quoted paragraph of the contract, that the plaintiff must "without further action by either party, be deemed to have abandoned his claim

said premises," and the contract to have become without "any force or effect as against said premises, or the title thereto or any right or interest therein, but not otherwise."

It may be true that the parties met to close the deal, and that at that meeting it was claimed for the plaintiff that the building the defendant contracted to convey to the plaintiff overlapped neighboring property, and that, although the defendant claimed that such was not the fact, the evidence of the surveyor and theplat showed that the defendant's building did overlap, and that, therefore, the title to the defendant's property was defective, but inasmuch as the written contract of exchange provided in express terms that the plaintiff, in case "material defects" were found, was obliged to give written notice, and no such notice was given, it follows that having failed to comply with the requirements of the contract, he himself, was in default and, therefore, not entitled to sue upon the note and claim a lack of faithful performance on the part of the defendant. Written notice, by the terms of the written contract, was made a prerequisite to liability on the defendant for "material defects" in the defendant's title.

We are of the opinion, therefore, that as the evidence shows that the plaintiff did not comply with the requirements of the contract; did not pursue the method expressly prescribed by the written contract, in order to put the defendant in default, he was not entitled to recover on the note in question.

The judgment, therefore, will be reversed.

THOMSON, P.J. AND O'CONNOR, J. CONCUR. REVERSED.

said premises," and the contract to have been without "any force or effect to diminish said premises, or the title thereto or any right or interest therein, but not otherwise."

It may be true that the parties met [illegible] and that at that meeting it was claimed for the plaintiff that the building the defendant contracted to convey to the plaintiff overlapped neighboring property, and that, although the defendant claimed that [illegible] not the case, the evidence of the conveyor was [illegible] that the defendant's building did overlap, but that, in effect, the title to the defendant's property was defective, but insomuch as the written contract of exchange provided in express terms that the plaintiff, in case "defective title" were found, was obliged to give written notice, and no such notice was given, it followed that [illegible] failed to comply with the requirements of the contract, and, in fact, was in default and, therefore, not entitled to [illegible] and claim a lack of fraudulent misrepresentation on the part of the defendant. Nothing [illegible], in the [illegible] of the [illegible] case, was more a proximate [illegible] in the defendant's mind for material defense in the defendant's mind.

[illegible] of the opinion, however, that the evidence does not [illegible] the contract; did not cause the [illegible] exceedingly [illegible] by the written contract, in order to put the defendant in default, he was not [illegible] on the note in question.

The judgment, therefore, will be reversed.

[illegible], J. [illegible]

30212

359 - 30212

5005

ARSULA NAVIKAS,

Appellee,

v.

WILLIAM NAVIKAS,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

240 I.A. 663

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On June 7, 1923, the complainant, Arsula Navikas, filed her bill for divorce in the Circuit Court of Cook County, against her husband, the defendant, William Navikas, praying for a divorce on the ground of extreme and repeated cruelty. On June 22, 1923, an order was entered by the Chancellor that $7.00 per week be paid to the complainant for the support of her child. On June 23, 1923, the husband filed an answer in which he denied the charges of cruelty.

On September 16, 1924, the cause came on for hearing in open court before the Chancellor. Both parties were represented by counsel. Evidence was introduced by both parties, and on September 29, 1924, a decree of divorce in favor of the complainant was entered. That decree provided, in addition to granting a divorce, that the complainant have the custody of their child, a daughter; that the defendant pay to the complainant, until the further order of the court, for the support of herself and the child

$8.00 per week; that the complainant retain as her own separate and sole property certain second mortgage notes . The decree reserved for further disposition the subject of an allowance to the complainant for her expenses for court reporter and witness fees and for her reasonable solicitor's fees.

On October 18, 1924, a supplemental decree was entered ordering that the defendant pay to the complainant the sum of $300.00 for her reasonable solicitors' fees, in four monthly installments of $50.00, beginning December 18, 1924, and that the defendant pay to the complainant the sum of $52.50 for her expenses for the court reporter. This appeal is by the defendant from the above mentioned decree of divorce entered on October 14, 1924.

The parties were married on February 3, 1913. At the time of the trial they had one child, a daughter, born on October 3, 1913. On June 6, 1923, the husband and wife separated.

The evidence of the wife is to the effect that on May 17, 1916, the defendant pushed her against the stove so that the skin was burned off her right arm; that on June 15, 1917, he pushed her against the wall, and when she ran through the door, threw a cup of coffee at her and struck her; that on December 15, 1919, he struck her in the eye with his hand; that on July 4, 1923, he pushed her out of bed.

$4.00 per week; that the complainant retain as her own separate and sole property certain second mortgage notes. The matter reserved for further disposition the subject of an allowance to the complainant for her expenses for court reporter and witness fees and for her reasonable solicitor's fees.

On October 16, 1924, a supplemental decree was entered ordering that the defendant pay to the complainant the sum of $200.00 for her reasonable solicitors' fees, in four monthly installments of $50.00, beginning December 16, 1924, and that the defendant pay to the complainant the sum of $25.00 for her expenses for the court reporter. This appeal is by the defendant from the above mentioned decree of divorce entered on October 14, 1924.

The parties were married on February 3, 1917, at the time of the trial they had one child, a daughter, born on October 3, 1921. On June 8, 1923, the husband and wife separated.

The evidence of the wife is that on the night of on May 17, 1919, the defendant, upon her return home so that the wife was barred off her room; that on June 16, 1917, he pushed her against the wall, and when she ran through the door, threw a cup of coffee at her and struck her; that on December 18, 1919, he struck her in the eye with his fist; that on July 4, 1921, he knocked her out of bed.

It is practically admitted by counsel for the defendant, and the evidence justifies the admission, that the charges of extreme and repeated cruelty, as alleged, were proven, but it is claimed, in exculpation, that the evidence all taken together demonstrates that there was subsequent condonation; and that although the defendant did not file a plea of condonation, the evidence considered in connection with the allegations of the complainant establishes a case of condonation so clearly and firmly, as to obviate the necessity of making it the subject of a special plea.

The defendant having failed to plead condonation at the outset, the question arises whether that defense is here available. In Klekamp v. Klekamp, 275 Ill. 98, the court said that the defense of condonation "should have been pleaded or set up in his answer," but intimated that it was within the power and discretion of the Chancellor to consider the subject of condonation" without regard to the question whether or not such defense was properly pleaded." In that case the court, also, said that "a defense of condonation is an affirmative one, and that the burden of proof is on the one claiming condonation." In the instant case, therefore, we shall consider the evidence as it pertains to condonation, even though the defendant failed to file a plea setting up that defense.

Where extreme and repeated cruelty is the gravamen of a bill, and the complainant proves a series of acts which in and of themselves are sufficient to justify a divorce, and the evidence shows that the parties lived together for quite

It is [illegible] by counsel for the defendant, and the evidence justifies the conclusion, that the charge of carrying an concealed deadly, as alleged, were proven, but it is claimed, in explanation, that the evidence all taken together demonstrates that there was abandonment condonation; and that although the defendant did put this a place of condonation, the evidence introduced in connection with the allegations of the indictment establish a case of condonation so clearly and strongly, as to obviate the necessity of sending it the subject as a special plea.

The defendant moving counsel to plead condonation at the outset, the question arises whether that defense is here available. In Jackson v. Commonwealth, 23 Gratt. 919, the court said that the defense of condonation [illegible] been pleaded or set up in the case, but intimated that it was within the power and discretion of the Commonwealth to consider the subject of condonation without being required to the question whether or not such defense was "properly pleaded." In that case the court, also, said that "a defense of condonation is an affirmative one, and like the words of [illegible] in an indictment one." In the instant case, therefore, we must [illegible] the evidence as it [illegible] to condonation, even though the defendant [illegible] a plea setting up that defense.

[illegible] deadly [illegible] of a gun, and the complainant [illegible] or [illegible] in the defendant's [illegible] of [illegible] a quarrel, [illegible] the defendant [illegible] the defendant [illegible]

a period of time thereafter, it is not necessary to refute a claim of condonation to prove such subsequent misconduct as would in and of itself justify a divorce.

In Farnham v. Farnham, 73 Ill. 497, where such acts of cruelty were proven as to justify a decree of divorce, unless they were subsequently condoned, the court said, "Condonation is defined in the books as forgiveness, upon condition the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness." Citing Bishop on Marriage and Divorce, Section 370, and Davis v. Davis, 19 Ill. 334.

Schouler says, "Any misconduct, not necessarily of the same class as that condoned, will revive the condoned offense (Doose v. Doose, 198 Ill. App. 387), even where the subsequent acts do not form an independent cause of action, as condonation is conditioned on future treatment with conjugal kindness.(Moorehouse v. Moorehouse, 90 Ill. App. 401), but slight acts of coldness or unkindness will not revive." Schouler, further, says, "the court will connect the whole of the unfaithful partner's conduct in order to form a correct judgment. Judicial inclination, on the whole, is to give to the injured one whose experiment of generosity has thus failed, the ample benefit of the original breach of conjugal duty."

The evidence shows that the last act of extreme cruelty took place on July 4, 1922, and that their separation took place on June 6, 1923, and it is urged for the defendant that it does not show that in the interim any-

a period of time thereafter, it is not necessary to
[illegible] a claim of condonation to prove such condonation
misconduct as would be had of itself justify a divorce.

In Kimball v. Kimball, 78 [illegible]. 499, where such
acts of cruelty were proven as to justify a decree of
divorce, unless they were a bona fide condoned, the court
said, "Condonation is defined in the books as forgiveness,
upon condition the injury shall not be repeated, and is
dependent upon future good usage and conjugal kindness."
citing Bishop on Marriage and Divorce, Section 375, and
Davis v. Davis, 19 Ill. 374.

Schouler says, "Any sins condoned, not necessarily
of the same place as that condoned, will revive the condoned offense (Jones v. Jones, 158 Ill. 78, 87), even
where the evidence does not tend to show a repetition of same
of action, as condonation is conditioned on future fidelity
with conjugal kindness. (Kerrigan v. Kerrigan, 90 Ill. [illegible],
401), but slight acts of indiscretion or unkindness will not
revive." Schouler, further, says, "The so-called condonation
the wife, of the matrimonial offense, is merely conduct in order to
form a correct judgment. Mental hesitation, on the part
in no sense to [illegible] the expectation of reconciliation
has thus failed, the single duality of the original bonds of
conjugal duty."

The evidence shows that the [illegible] not of sufficient
cruelty took place on July 4, 1[illegible], and that such cruelty
then took place on June 6, 1[illegible], which is legal for the
defendant. There is some [illegible] in the [illegible]

thing transpired in their domestic relations which could be looked upon as other than normal and as giving just grounds for the inference that the former acts of cruelty had not been condoned. In the view we take of the evidence, however, that inference is not justifiable. The evidence shows that both husband and wife were hard working people, and that the wife, as well as the husband, worked out for wages most of the time; that she not only worked out for wages, but at the same time took care of their home and fulfilled her domestic duties and gave birth to a child. Counsel for the defendant stated on the trial, "We will admit, to save time, that she was a good wife." But the evidence shows, according to her testimony, that he was mean and cruel to her generally, and illustrating what took place after the cruelty of July 4, 1922, she testified, "I remember one time, I guess it was in 1922, about in September, * * * when he was mean to me * * * we had arguments on account of my friends that came from Rockford. He refused to eat at that time. He was mean to me. I lay on the floor, I didn't want to hear those arguments, and he hollered * * * and swore at me. He called me all kinds of names. * * * I lay on the floor and asked him, 'Why should you be so mean to me?'"

She further testified, when asked if she remembered any particular date or dates that those things happened, as follows: "I remembermost every day when he hit me, and other days, you know, we have arguments, most every day when eating supper; sometimes ithappens with the child and she used to do something with the papers and when he got home,

to see just that he used to be rough, and then I cry myself, and then come such happenings." Upon describing the events on July 4 and September 15, 1922, and being asked if she remembered any other date, she answered, "Well, I remember that; I remember we had it mostly about twice a week, such argument, since we married." She further testified, when asked how her husband treated her just before they sold their property on May 22, 1923, that "he was mean to me so much. He always swore at me. He used to be mean to me, and he would go away at nights and play cards.

Considering all the evidence as the record discloses it, we are impelled to the conclusion that although she did not separate from him until June 6, 1923, and although the last specific act of extreme cruelty occurred on July 4, 1922, and that in the interim they lived together as husband and wife, it would not be unreasonable to hold that condonation had taken place. She lived with him after the cruelty of July 4, 1922, until June 6, 1923, but with the evidence as it is, we do not feel entitled to override the decree of the Chancellor that the husband was guilty of cruel conduct, although not of as extreme a character as the particular acts above described, between those dates.

It is contended that the Chancellor erred in entering the supplementary decree of October 18, 1924. The decree ordered the defendant to pay the sum of $200.00 for the reasonable solicitor's fees of the complainant, and $52.50 for her expenses for court reporting. It is urged that the Chancellor did not have jurisdiction to make that order; but as the decree of divorce entered on September 29, 1924,

to see just that he used to be seen, and then I cry upon, and then some such hypocrisy." Upon describing the events on July 4 and September 18, 1977, and being asked if she remembered any other date, she answered, "Well, I remember that; I remember we had it nearly about twice a week, such arguments, times so mixed." The further testified, when asked how far removed was her just before they sold their property on May 28, 1972, that "he was seen to go so much. He always wrote at me. He used to be seen to me, and he would go away at nights and fully write.

Considering all the evidence as the record discloses it, we are impelled to the conclusion that although she did not separate from his until June 8, 1972, and although the last quarrelsome act of extreme cruelty occurred on July 4, 1977, and that in the interim they lived together as husband and wife, it would be unreasonable to hold that condonation had taken place. She lived with his after the cruelty of July 4, 1977, until June 8, 1978, but with the evidence as it is, we do not feel entitled to interfere in the decree of the Chancellor that her husband was guilty of cruel conduct, although not of as serious a character as the particular acts upon which condoned, between those dates.

It is contended that the Chancellor erred in entering the supplementary decree of October 16, 1978. The decree ordered the defendant to pay the sum of $500.00 for reasonable solicitor's fees of the complainant, and $75.00 for her expenses for court reporting. It is argued that the Chancellor did not make jurisdiction to make that order, but in the decree of divorce entered on January 28, 1978.

reserved "for future disposition" the allowance to the complainant for solicitor's fees and court reporter's fees, that contention is not tenable. As to the amounts which the supplementary decree actually allowed, the evidence shows, considering the pecuniary situation of the parties and the services rendered by the defendant's solicitors, that the allowances were not unreasonable in amount. Such matters were within the sound legal discretion of the Chancellor; and considering the evidence, the relation of the parties, and their condition in life, we are unable to discover any sufficient reason for holding that there was an abuse of that discretion.

Finding no error in the record, the decree will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

reserved "for future disposition" the allowance to the complainant for solicitor's fees and court reporter's fees, that contention is not tenable. As to the amounts with the supplementary decree certainly allowed, the evidence shows, considering the seasonably elevation of the parties and the services rendered by the defendant's solicitors, that the allowances were not unreasonable in amount. Such matters were within the sound legal discretion of the Chancellor; and considering the evidence, the relation of the parties, and their condition in life, we are unable to discover any sufficient reason for holding that there was an abuse of that discretion.

Finding no error in the record, the decree will be affirmed.

AFFIRMED.

THOMPSON, J., of Division, A. concurs.

500

381 - 30234

HELEN N. COUFFER, Appellee, v. GEORGE EDDY NEWCOMB, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

240 I.A. 664

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 24, 1925, an order was entered in this court consolidating this cause with Newcomb v. Newcomb, General Number 30233, for hearing, and providing that the record, files, abstract and briefs in the latter cause should stand and be taken and considered as the record, files and abstracts and briefs in the former cause.

On January 27, 1925, the plaintiff, Helen N. Couffer, recovered a judgment in the sum of $867.22 and costs, against the defendant, George Eddy Newcomb. This appeal is from that judgment.

We have this day handed down an opinion in Newcomb v. Newcomb, General Number 30233, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment of the County Court, therefore, is affirmed.

THOMSON, P.J. AND O'CONNOR, J. CONCUR. AFFIRMED.

Helen N. Couffer, appellee, v. George Eddy Newcomb, appellant.

No. 30,235.

240 I.A. 664

the Municipal Court of Chicago;
Superior Court of Cook county;
from the Circuit Court of county;
County Court of county;
, Judge, presiding. Heard
the Branch Appellate Court
this court at the term,
on authority of
d
d
d and remanded with directions.
filed Rehearing denied
for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
NG JUSTICE delivered the opinion of the court.

record, files, abstracts and briefs in the former cause.

On January 27, 1925, the plaintiff, Helen N. Couffer, recovered a judgment in the sum of $980.22 and costs, against the defendant, George Eddy Newcomb. This appeal is from that judgment.

We have this day handed down an opinion in Newcomb v. Newcomb, General Number 30333, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment of the County Court, therefore, is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

382 - 30235

HELEN H. COUFFER,
Appellee,

v.

GEORGE EDDY NEWCOMB,
Appellant.

240 I.A. 664

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 24, 1925, an order was entered in this court consolidating this cause with Newcomb v. Newcomb, General Number 30233, for hearing, and providing that the record, files, abstract and briefs in the latter cause should stand and be taken and considered as the record, files, abstracts and briefs in the former cause.

On January 27, 1925, the plaintiff, Helen H. Couffer, recovered a judgment in the sum of $980.22 and costs, against the defendant, George Eddy Newcomb. This appeal is from that judgment.

We have this day handed down an opinion in Newcomb v. Newcomb, General Number 30233, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment of the County Court, therefore, is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

Opinion filed Jan. 20, 1986.

30236

303 - 30236

BESSIE J. NEWCOMB, Appellee,	APPEAL FROM COUNTY COURT, COOK COUNTY.
v.	
GEORGE EDDY NEWCOMB, Appellant.	240 I.A. 664

Opinion filed Jan. 20, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 24, 1925, an order was entered in this court consolidating this cause with Newcomb v. Newcomb, General Number 30233, for hearing, and providing that the record, files, abstract and briefs in the latter cause should stand and be taken and considered as the record, files, abstracts and briefs in the former cause.

On January 27, 1925, the plaintiff, Bessie J. Newcomb, recovered a judgment in the sum of $565.38 and costs, against the defendant, George Eddy Newcomb. This appeal is from that judgment.

We have this day handed down an opinion in Newcomb v. Newcomb, General Number 30233, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment of the County Court, therefore, is affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

Opinion filed Jan. 20, 1938.

13 - 29549

IDA G. HOGG, Individually and as administratrix of the estate of LLOYD W. HOGG, deceased, and GEORGE W. HOGG, a minor, by IDA G. HOGG, his next friend,
Defendants in Error,

v.

JULIA CUMMINGS HOHMANN et al.,
Plaintiffs in Error.

240 I.A. 664

ERROR TO

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

By this writ plaintiff in error, Julia Cummings Hohmann, seeks the review of a decree against her in a suit in chancery brought by the widow of Lloyd W. Hogg, deceased, as administratrix of his estate, and by his minor son, to recover property alleged to belong to his estate. Two other defendants, George Hohmann, the divorced husband of Julia Cummings Hohmann, and Theodore P. Keller, her son-in-law, have appealed, and the several cases have been consolidated for hearing upon the same record.

The evidence was heard by the chancellor whose findings of fact were in accordance with the material allegations of the amended bill of complaint and the amendment thereto. The findings bearing upon the material facts at issue are substantially as follows: Said Hogg died August 4, 1921. On the 24th of March, 1921, he was the owner of 1,000 shares of the capital stock of the Anaconda Copper Mining Company in the form of 10 certificates for 100 shares each, of the value of about $40,000. For several years prior to and up to the time of his death he suffered from a malignant tumor of the brain. On March 31, 1921, a surgical operation was performed and it was found that the tumor could not be removed, and on March 24, 1921, and for some time prior thereto until the time of his death he was not of sound mind and memory.

A O. HOOD, individually and
administrator of the estate
LEROY H. HOOD, deceased,
GEORGE A. HOOD, a minor,
IRA E. HOOD, his next friend,
Defendants in Error.

v.

ELIA GUMMINGS MORGAN et al.,
Plaintiffs in Error.

MR. PRESIDING JUSTICE ADAMS
DELIVERED THE OPINION OF THE COURT.

By this writ plaintiff in error, Julia Cummings Morgan, seeks the review of a decree entered her in a suit in chancery brought by the wife of Oliver T. Hood, Sarah and, as administratrix of his estate, and by his minor s n, to be quiet title against claims to his estate. The minor defendants, George Hoodson, by their guardian ad litem, and the [illegible] have been committed for [illegible] upon [illegible].

The evidence was heard by the chancellor [illegible] Last were in accordance with the material allegations of the amended bill of complaint and the answers of [illegible]. The decree [illegible] upon the material issues [illegible] follows: Said Leroy died August 6, 1923. At the time of his death, he was the owner of 1, [illegible] of the residual estate of the [illegible] Property State Company in the sum of $[illegible] [illegible] shares each, of the value of [illegible]. The [illegible] [illegible] to and up to the time of his death [illegible] [illegible] tigation under of the bonds. On March [illegible], 1921, a [illegible] [illegible] and partnership bonds it was found to be [illegible] [illegible] removed, and on March 14, 1921, the [illegible] [illegible]

and was mentally incapacitated to care for and manage his own estate and affairs and his own property. For some years prior to and up to the time of his death the defendants Julia Cummings Hohmann, George Hohmann and Marion Hohmann Keller, the daughter of Julia Cummings Hohmann, were close personal friends of said Hogg in whom he reposed great confidence and trust, and that the said Julia Cummings Hohmann and said Kellers occupied a fiduciary and confidential relation towards him. On March 24, 1921, by reason of such relationship said Julia Cummings Hohmann obtained possession of said certificates of stock, then owned by and standing in the name of said Hogg and endorsed in blank by him, without paying or giving him any consideration therefor, and on said date they were delivered to William H. Yetman, husband of defendant Dorothy Yetman, and were reissued at the request of said Julia Cummings Hohmann in the name of William H. Yetman who endorsed and delivered them back to her. On April 16, 1921, she caused new certificates of stock to be issued to defendant Theodore F. Keller, her son-in-law, without any good or valuable consideration, which said Keller holds for her benefit. The court found that the certificates were never given and delivered by Hogg as a gift to said Julia Cummings Hohmann, as she and the Kellers claimed, but were his property at the time of his death.

The court further found that during the mental incapacity of said Hogg, Julia Cummings Hohmann by reason of the fiduciary relation aforesaid, became possessed of certain United States Government Bonds known as Liberty Loan Bonds, the property of said Hogg, of the value of $100,000; and that after the filing of the original bill and an injunction had been issued and served on her she delivered to defendant Dorothy Yetman $5,350 of said bonds without any consideration therefor, and that said ownership of all said bonds was in Hogg at the time of his death.

[illegible]

The decree ordered the surrender of said certificates of stock, and upon their surrender that new certificates therefor be reissued to the administratrix. The decree also enjoins and restrains the prosecution of a suit in the Circuit Court of Milwaukee County, Wisconsin, brought by Julia Cummings Hohmann against Dorothy Yetman for the recovery and possession of said $5,250 of liberty bonds in the possession of the clerk of said court, in which suit said administratrix had intervened to assert her claim thereto, and enjoins and restrains Dorothy Yetman from asserting any right, title or interest therein, and orders Julia Cummings Hohmann to deliver within ten days to the administratrix all the remaining $94,752 of said liberty bonds, and on failure so to do gives complainant the right to apply for a judgment against her for their value with legal interest from the time of Hogg's death.

So far as Julia Cummings Hohmann, the plaintiff in error, is concerned the questions presented relate to her claim to said 1050 shares of stock and to liberty bonds that came into her possession, the amount of which is also in controversy. Appellant Theodore P. Keller is interested only as holder of said certificates of stock in which he claims no personal interest, admitting that he holds them for the use and benefit of plaintiff in error, and hence the merits of his appeal depend upon the disposition of the writ of error.

The appeal of George Hohmann is from that part of the decree finding and adjudging him indebted to the estate for $26,831.67 and authorizing an execution therefor. The merits of his appeal will be considered in a separate opinion. The Yetmans were defaulted and were called as witnesses by complainant.

The answer of Julia Hohmann took issue upon the main facts as alleged in the bill and found in the decree, denying that Hogg became of unsound mind and mentally incapable, as

aforesaid, and that she had received any property whatsoever from him without good and valuable consideration therefor. It averred that the Anaconda stock was delivered by him to her long prior to March 24, 1921, that she was the owner and possessor thereof, and that the new certificates were issued in the name of Theodore Keller as her agent and representative, and delivered by him to her. Keller's answer admitted that the transfer was for her use and benefit. Her answer denied having transferred to Dorothy Yetman any property received from the deceased, Lloyd W. Hogg, or having assigned to her liberty bonds in the amoubt of $5,250, and averred that she has received no property whatsoever from the said Hogg "without good and valuable consideration therefor." The answer also denied the general charge in the bill that defendants came into possession of other securities and bonds, (not described in the bill as to their character or amount) after decedent became mentally incapacitated as aforesaid.

We are asked to hold that the chancellor's findings are manifestly against the weight of the evidence. It is impracticable and unnecessary to review at length the testimony covering, as it does, nearly 2500 pages of the record.

The principal points of controversy were as to the mental state of said Hogg, the ownership of, and when and how plaintiff in error became possessed of the Anaconda stock and liberty bonds, and the amount of the latter.

On a post-mortem examination it was found that the deceased had a large glioma tumor which occupied the entire left occipital lobe of the brain and encroached forward into the temporal lobe. It was at least three and perhaps four inches in diameter and had calcified spots in the center which indicated that it had been there for many months. Such a tumor grows through the normal brain tissue and extends further than can be seen without the aid of a magnifying glass. It was found on an operation performed on

the left side of his head on March 31, 1921, that the tumor could not be removed. Complainant's evidence tended to show that as far back as 1917 his conduct on occasions became unusual, that his character commenced to change, and a change of conduct towards his wife and child became marked. These symptoms increased down to February 1, 1921, when he was seized with violent and constant headaches, after which time he was unable to carry on a continued conversation because of his inability to use or recall words, and was unable to transact business. In answer to a hypothetical question based upon these and other facts, unnecessary to enumerate, several doctors gave it as their opinion that the deceased was not competent to transact ordinary business from the latter date to the time of his death, which happened August 4, 1921, from an accident having no bearing on the issues of the case. An equal number of doctors and even more lay witnesses called by plaintiff in error testified to a contrary opinion. We see no reason for entering into a discussion upon the relative weight of such testimony, which depended, we think, very largely upon the impressions the court received from the testimony of those having scientific knowledge of the disease. As to the findings on this and other controverted questions, much depended upon the character, appearance, deportment, experience and credibility of the witnesses, with respect to which the chancellor, as so frequently stated, is in a much better position to reach conclusions than we are. Not being able to say the chancellor's findings are against the weight of the evidence so far as they relate to the mental incapacity of the deceased, the fiduciary relation between him and plaintiff in error, her dominant influence over him during such relationship, and his ownership of said stock and of the $5,250 of liberty bonds, we shall not undertake to discuss the voluminous evidence or disturb the findings on those subjects.

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lower or minute the findings on these subjects.

The transfer of the Anaconda stock, as stated, is not disputed. Only the ownership thereof is questioned. While the evidence for plaintiff in error tended to show that Hogg made her a gift of the stock in 1919, and she disclaimed having received any bonds from Hogg, the evidence for complainant tended to show that she came into possession of such stock and bonds of an uncertain amount while Hogg was thus mentally incapacitated, and her testimony in the Wisconsin suit as to how she came in possession of said stock was wholly at variance and inconsistent with her testimony in the instant case on that subject. In the former she testified that the stock came to her in a settlement made with her husband in lieu of alimony. In the instant case she testified it was a gift from the deceased. Her contradictory statements under oath on such an important matter might well justify rejection of her other testimony on disputed questions. And in this connection it should not escape observation that she made no claim of a gift in her answer. While her failure so to do was a breach of the rule in chancery which requires defendant's answer to apprise complainant of the nature of the defense (Crane v. Crane, 180 Ill. 606), the reservation of her claim of a gift until trial was not calculated to inspire confidence in the sincerity of her defense.

That a fiduciary and intimate relation existed between her and Hogg for a long period of time prior to his death and that they were much together in the last few months of his life are hardly matters of controversy. The inference is palpable, too, that she exercised a dominant influence over him and particularly after his mind was weakened from disease in the last year of his life.

While there was conflicting evidence as to when she came into possession of the stock and bonds we think the evidence, especially in view of the contradictory statements of plaintiff in error above referred to, justifies the court's findings thereon, and that it was sufficient to raise the presumption that if there

[illegible]

was a gift of the stock or bonds it was obtained by improper means, thus throwing upon her the burden she did not sustain of proving that it was his free and voluntary act. (Beach v. Wilton, 244 Ill. 413, 423; Willard v. Willard, 281 id. 86, 93; Gilmore v. Lee, 237 id. 402, 411; Rutherford v. Schneider, 307 id. 23; Berthelot v. Isaacson, 278 Fed. 923; Haydock v. Haydock, 34 N. J. Eq. 570, 574; Houghton v. Houghton, 15 Beav. 278, 298; 51 Eng. Reprint 553; Cooke v. Lamotte, 15 Beav. 234.)

"Whoever alleges a gift must prove it satisfactorily; a doubtful case will not do." (Doty v. Wilson, 47 N. Y. 580, 585.) It was said in Mers v. Peterson, 261 Ill. 532, and again in Beach v. Wilson, supra, that when a confidential or fiduciary relation is established between parties courts of equity scrutinize very closely any transaction between them by which the dominant party secures any profit or advantage at the expense of the person under his influence. In such a case, the court said, proof must be clear and convincing and satisfy the conscience of the chancellor that good faith has been exercised, and that the confidence reposed in the beneficiary has not been betrayed. Especially will evidence of alleged admissions by a deceased person be received with great caution. (Laurence v. Laurence, 164 Ill. 367; Bragg v. Geddes, 93 Ill. 39.) It is mainly upon evidence of decedent's alleged admissions that plaintiff in error relies for corroboration of her testimony of a gift. "Claims of this character are so open to fraud, so liable to be made especially against the estates of deceased persons, when there is little foundation for them that courts will not regard them with favor and will not sustain them unless fully proved; in other words, there is no presumption in their favor." (Burton v. Bridgeport Bank, 52 Conn. 398, 403.)

In Cooke v. Lamotte, supra, it was said that the relation in which domination may be exercised by one person over another may be said to apply to every case in which two persons are so situated "that one may obtain considerable influence over the other." There

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was his free and voluntary act. ([illegible] v. [illegible], [illegible] Ill. 41[illegible]

; Willard v. Willard, [illegible] Ill. [illegible]; Gilmore v. Lee, 237 Ill.

, 411; Sutherland v. [illegible], [illegible] Ill. [illegible]; [illegible] v.

ason, 270 Ill. 52[illegible]; [illegible] v. [illegible], 31 N. J. Eq. 370, [illegible]

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can be little doubt of such a relation from the evidence in this case. Not only does such a confidential relation give cause for suspicion but as said in Beach v. Wilton, supra, all transactions between parties in that relation are presumptively fraudulent and void. The court also said: "The fiduciary relation exists between parties where there is a relation of trust and confidence between them, - that is, where confidence is reposed in one party and the trust accepted by the other." The term is a very broad one. (Meyrand v. Meyrand, 194 Ill. 45.) In the latter case the court said: "The origin of the confidence and the source of the influence is immaterial. The rule embraces both technical fiduciary relations and those informal relations whenever one man trusts in and relies upon another. The only question is does such a relation exist?"

As shown by evidence, which we think the court was justified in accepting as true, the conduct of plaintiff in error from the time Hogg's condition became apparent after the operation upon his skull until his death, disclosed great anxiety and a purpose to cover up and conceal her possession of said stock and bonds and to place them beyond the reach of decedent's estate in case of his death. This attitude was displayed after his death and the commencement of this suit, and her contradictory statements as to how she became possessed of the stock, which tend to discredit her entire testimony, her efforts to avoid service in the suit and openly meet issues that brought her character and integrity into question, her unsatisfactory explanations - these and many other matters of detail are inconsistent with honest purposes and her claim that the stock was a gift to her some two years before decedent's death.

It is true that the court's findings depend much upon the evidence furnished by the Yetmans. While their testimony is severely criticised, yet they had no real personal interests to subserve, at least to the extent plaintiff in error and her family

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It is true that the counsel's argument tended much upon
evidence furnished by the witnesses. While their testimony is
erally criticized, yet they had no real personal interest to
serve, at least to the current plaintiff in error and her family

had, and the motives ascribed to them by counsel for plaintiff in error, while a proper subject for consideration, cannot reasonably be deemed such as would induce them to fabricate the many details, facts and circumstances to which they testified. Besides many of them harmonize with circumstances, times and places that are not questioned. Their testimony as to many important facts was denied only by plaintiff in error and her daughter and her son-in-law, whose interest in the outcome of the case was large and vital. After a thorough review of the evidence, we think the court may well have accepted the testimony of the Yetmans as against the interested and discredited testimony of plaintiff in error.

But the finding of the court of plaintiff in error's liability for the additional $94,750 of bonds rests wholly upon alleged statements of plaintiff in error that she had access to decedent's vault and had taken $100,000 of liberty bonds therefrom, which he would want her to have if anything happened to him. Outside of such statements or admissions there was no direct or persuasive proof that more than $5,250 of bonds came into her possession. The Yetmans did not pretend to have seen the denominations of the bonds in her possession except once when a package of reputed bonds disclosed a $1,000 bond on top. The package was in an envelope 12 inches long and about 2 inches thick. Even if the bonds were of the denomination of $1,000 each it is questionable whether one hundred of them could have been placed in an envelope of that size. But there was no proof of bonds of any larger denomination or in fact that the deceased ever had $100,000 of such bonds, or in fact that he had any in the last year of his life. The fact that the disposition of his large fortune could not be accounted for and that he left less than $1,000 in his bank, and that he had a deposit therein in April, 1921, of over $88,000, and that his large income of over $100,000 a year for four or five

[illegible] plaintiff

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years prior to the year of his death had in some way disappeared will not, in the absence of some direct proof on the subject, warrant, in our opinion, basing the specific finding against plaintiff in error as to the $94,750, or a judgment against her for that amount. All the evidence with regard to her possession of liberty bonds, except her alleged but contradicted statements as to $100,000 worth, is consistent with her possession of only the bonds she delivered to Dorothy Yetman. While she introduced evidence to the effect that the latter bonds were purchased by her, yet the circumstances attending her disposition of them when considered with her various statements regarding how and when the bonds came into her possession, justified the court's finding that they belonged to decedent.

It appeared, too, that decedent drew the dividends on the stock after the time plaintiff in error claimed he gave her the certificates, and that he had access to her vault in which she claimed to have kept the stock and from which she took it to be transferred in the name of Yetman. The arrangement for the transfer occurred after the operation on decedent's skull, and while he was still in the hospital. She was reported to have said then that if anything happened to Hogg he would want her to have the stock. All this is inconsistent with a gift inter vivos. "It is essential to such a gift that it be absolute and irrevocable; that the giver part with all present and future dominion over the property given; that the gift go into effect at once, and not at some future time; that there be a delivery of the thing given to the donee, and that there be such a change of possession as to put it out of the power of the giver to repossess himself of the thing given." (People v. Osenton, 275 Ill. 406; Telford v. Patton, 144 Ill. 611.)

It was also said in Rothwell v. Taylor, 303 Ill. 230, that "mere possession by one claiming property as a gift after the death of the owner, is universally, we believe, held in-

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It was also held in [illegible], [illegible]
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sufficient to prove a valid gift."

Counsel for plaintiff in error invoke the application of section 5 of the Uniform Stock Transfer Act (See Ch. 32, par. 233, Cahill's Stats. 1925,) that the delivery of the certificates in accordance with section 1 of that act is effectual, except as provided for in section 7 of the act, to transfer the title. But there are two exceptions in said section 7 applicable to this case; (1) where the delivery is procured by fraud, - which would be presumed under such circumstances as appear in this case, - and (2) where the delivery is made after the owner's legal incapacity.

It is urged that the court improperly rejected offered proof to the effect that plaintiff in error had stated to different witnesses, prior to the time she disclosed her possession of the stock to the Yetmans, that she owned the stock, and counsel referred to the case of Martin v. Martin, 174 Ill. 377, in support of that position. If the court improperly rejected such proof we cannot deem it reversible error, for if the court would not accept plaintiff in error's sworn statement as to her ownership of the stock it is difficult to see how it could have been influenced by her unsworn statements made in circumstances that had no real probative force to support them.

Nor do we think there was reversible error in not permitting the daughter of plaintiff in error, called to rebut certain conversations testified to by the Yetmans, to testify to matters as a part of said conversations that had no material bearing on the questions at issue and which had no legitimate relation to the testimony given by the Yetmans.

We fail to find any reversible error except the finding respecting the amount of the liberty loan bonds that came into possession of plaintiff in error.

The decree will be affirmed in all respects so far as it pertains to plaintiff in error except so far as it requires her to deliver to the clerk of the court the remaining $100,000 of liberty loan bonds and coupons attached thereto, in the amount of $94,750, and authorizing on her failure so to do a judgment against her for the latter sum with interest from the 4th day of August, 1921.

AFFIRMED IN PART AND REVERSED IN PART,
AND REMANDED.

Gridley and Fitch, JJ., concur.

17 - 29581

IDA G. HOGG et al.,
Complainants and Appellees,

v.

JULIA CUMMINGS HOHMANN et al.,
Defendants.

On appeal of GEORGE HOHMANN,
Appellant.

240 I.A. 664

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree finding that appellant George Hohmann is indebted to the estate of Lloyd W. Hogg for $26,821.67, principal and interest, and ordering him to pay said amount to the administratrix of said estate.

The bill of complaint, as finally amended, charges that in 1920 he borrowed $22,000 from said Hogg and gave his promissory note therefor. The bill also charges that defendant Julia Cummings Hohmann before the death of said Hogg came into possession of certain certificates of the capital stock of the Anaconda Copper & Mining Company and of certain bonds, without giving any consideration therefor, which belonged to said Hogg and are the property of his estate; that the stock was transferred to her son-inlaw Theodore P. Keller for her use and benefit and stands in his name. The decree ordered the surrender and retransfer of said stock and the delivery of said bonds to said administratrix. The bill further charges that appellant entered into a conspiracy with defendants Julia Cummings Hohmann, Theodore P. Keller and Marion Hohmann Keller to cheat and defraud said estate out of said stock and bonds and his alleged debt. The decree, however, finds that George Hohmann did not enter into such

conspiracy but merely that he was indebted as aforesaid and that Hogg never released or forgave the debt, as he claimed, and orders payment of the same to said estate and that said administratrix have execution on the judgment.

We think the court below erred in not dismissing the bill for want of equity as to said appellant. In the absence of any proof of conspiracy he was not in anywise connected with the causes of action against the other defendants. The only attempt to connect him with them was by said charge of conspiracy. The court's finding to the contrary left as the only charge against him found to be proven the existence of such indebtedness, which presented a cause of action, for which complainant had an adequate remedy at law. The rule has often been repeated that a party can have no standing in a court of equity who has a plain and adequate remedy at law. (Gore v. Kramer, 117 Ill. 143, 151.) The mere fact that the alleged promissory note could not be found did not furnish ground for equitable relief. Section 14 of our Negotiable Instrument Act (Ch. 38, R. S.) recognizes the right to bring an action at law on a lost note, and the common law rule which permits actions at law on lost notes or instruments has often been enforced in courts of this State. (O'Neil v. O'Neil, 133 Ill. 361; Devine v. Bickel, 189 Ill. App. 116; Siegel v. Dickinson, 163 id. 26; Petrue v. Wakem & McLaughlin, 99 id. 463; Fleet v. Hertz, 98 id. 564; Adler v. Uchtmann, 10 id. 489.)

In Brauer v. Laughlin, 235 Ill. 265, where there was a recovery in a chancery case upon a purely legal demand, as in the case at bar, the court said:

> "Courts will not permit parties to sue in chancery, and upon failure to establish a basis for equitable relief have the bill retained for the purpose of a recovery upon a purely legal demand. To allow this to be done would be to deprive the defendant of his constitutional right of trial by jury. * * * We have held that a court of chancery has power, where any equitable conditions exist authorizing it, in order to do complete justice between the parties, to enforce legal as well as equitable rights, but the equitable

[illegible]

conditions authorizing it depend upon the proof and not upon the bare allegations of the bill."

It was also said in Tarr v. Stearman, 264 Ill. 110:

"Allegations in a bill upon which chancery jurisdiction might be maintained but which are not proved on the trial and upon which no relief is decreed, will not authorize a decree on such parts of the bill which, if standing alone, would not give the court jurisdiction."

What was said in those cases is applicable here. There was no proof whatever of equitable conditions charged in the bill by which George Mohmann was made a party thereto. As far as he is concerned the findings of the court are merely to the effect that he was liable to the estate of said Hogg for an unpaid indebtedness incurred to the latter in his lifetime.

On the question of equity jurisdiction in such a case counsel for appellees have cited many cases where resort to equity was had on lost sealed instruments because profert was necessary and oyer was allowed at law, or on negotiable securities because of the necessity of tendering indemnity which could not at common law be furnished in a legal proceeding. But equity will not entertain jurisdiction for relief upon a lost negotiable note, or other unsealed security, so as to decree payment upon the mere fact of loss. (Story on Eq. Jur. 14 Ed., secs. 126, 127.) As said by the author cited, there would be no necessity for an offer of indemnity if the note was not negotiable and consequently no relief could be had in equity. A fuller statement of these distinctions is unnecessary here. They are also referred to in Pomeroy's Eq. Jur. 4th Ed., sec. 71. But in the case at bar there is no averment that the note was even negotiable nor does the bill make any offer of indemnity. It is very clear that only an action at law would lie upon the note in the absence of any averment supported by proof that confers equity jurisdiction.

The merits of the case we need not discuss for if complainants are entitled to any relief they must resort to a

conditions authorizing it depend upon the proof and not upon the bare allegations of the bill."

It was also said in Tort v. Hemming, 92 Ill. 139:

> "Allegations in a bill upon which an accessory jurisdiction might be sustained but which are not proved on the trial and upon which no relief is decreed, will not authorize a decree on such parts of the bill which, if standing alone, would give the court jurisdiction."

What was said in those cases is applicable here. There is no proof whatever of equitable conditions charged in the bill which George Hickman was made a party thereto. As far as he is concerned the findings of the court are wholly in the effect that he was liable in the estate of Will County for an unpaid indebtedness incurred to the latter in his lifetime.

On the question of equity jurisdiction in such a case several for specialties have stated many cases where resort to equity had on last resort instrumentis because proofs was necessary and ever was allowed at law, or on negotiable instruments because the necessity of producing instrument which could not be assumed to be furnished in a legal proceeding. But equity will not entertain jurisdiction for relief upon a lost negotiable note, on other unmarked security, or in a decree payment upon the note of loss. (Story on Eq. Jur. 14 Ed., secs. 1451.) As said by the earlier cases, there could be no necessity for an order of in.equity if the note was not negotiable and consequently relief could be had in equity. Other instruments of these conditions is unnecessary here. They are also referred to in Story's Eq. Jur. 4th Ed., sec. 71. But in the case at bar there is no evidence that the note was negotiable nor does the bill make any effort of indorsement. It is very clear that only a action at law could lie upon the note in the hands of the overment supported by proof that contains equity jurisdiction.

The merits of the case we need not discuss for if complainants are entitled to any relief they must resort to a

court of law to obtain it.

Counsel for appellees urge upon our consideration that the chancellor's finding that there was no such conspiracy as alleged was against the weight of the evidence. Surely they cannot be unmindful of the familiar rule which precludes consideration of such question in the absence of filing cross errors.

The decree must, therefore, be reversed so far as it undertakes to enter a judgment against appellant George Hohmann, and the cause remanded with directions either to dismiss the bill as to defendant George Hohmann or in the discretion of the court to transfer the suit as to him from the chancery docket to the law docket as provided by section 40 of the Practice Act.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Fitch, JJ., concur.

court of law to obtain it.

Counsel for appellees urge upon our consideration that the chancellor's finding that there was no such conspiracy as alleged was against the weight of the evidence. Surely they cannot be unmindful of the familiar rule which precludes consideration of such question in the absence of filing cross errors.

The decree must, therefore, be reversed so far as it undertakes to enter a judgment against appellant George Hohmann, and the cause remanded with directions to dismiss the bill as to defendant George Hohmann.

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Fitch, JJ., concur.

ment of law to obtain it.

Counsel for appellant urge upon our consideration that the chancellor's finding that there was no such conspiracy as alleged was against the weight of the evidence. Strongly they cannot be unmindful of the fertility with which ingenious counsel can marshal a strong question in the absence of a strong court error.

The decree may, therefore, be reversed as to defendants to enter a judgment against appellant George Bowman, and the same remanded with directions to dismiss the bill as to defendant George Bowman.

MCKENZIE AND HOLLIDAY WITH MODIFICATION.

Holliday and Eaton, JJ., concur.

38 - 30273

5327a

THE FIRST ITALIAN STATE BANK,
a corporation,
Defendant in Error,

v.

FRATELLI CANNATO,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 664

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

On September 11, 1924, a judgment by confession under power of attorney attached to a note was entered against "Fratelli Cannato." Said note was signed in the names of Mario Avallone and Fratelli Cannato as makers thereof. On March 19, 1925, a motion was made to vacate such judgment based on the affidavit of Joseph Cannato, setting forth that he was the sole owner of a business conducted under the name of "Fratelli Cannato;" that he never signed or authorized the signature to said note of "Fratelli Cannato;" that he is informed that said note was signed by said Avallone, but that the same was signed without his knowledge and without any obligation on his part or any authorization by him; that garnishment proceedings were had upon said judgment against the bank account in the name of "Fratelli Cannato," and that he had no knowledge of these proceedings or the judgment on account of his absence on a business trip to Italy, from which he had only shortly returned before making said motion. The court denied the motion, but we think under its equitable power in such a case it should have opened up the judgment and permitted a defense, allowing the judgment to stand in the meantime as security. For error in denying the motion

- 30275

THE FIRST ITALIAN STATE BANK,
a corporation,
Intervenor in error,

v.

FRANCIS CARNATO,
Plaintiff in Error.

MOTION TO
DISMISS
WRIT OF ERROR.

Mr. PRESIDING JUSTICE MORAN
DELIVERED THE OPINION OF THE COURT.

On September 11, 19[illegible] a judgment by confession was [illegible]
[illegible]er of attorney which is a note [illegible] authorized [illegible]
[illegible]Trosilli Commerce." Said note was signed in the name of Carlo
[illegible]Allone and Trosilli Commerce as maker thereof. On March 19,
[illegible]5, a motion was made to vacate such judgment based on the
[illegible]ldavit of Joseph Commerce, setting forth that he was the sole
[illegible]er of a business conducted under the name of "Trosilli Commerce;"
[illegible]t he never signed or authorized the [illegible] contained in said note of
[illegible]rosilli Commerce;" that he is informed that said note was signed
[illegible] said Avallone, but that the same was signed without his
[illegible]wledge and without any obligation on his part or by
[illegible]thorization by him; that certain [illegible] proceedings were [illegible] upon
[illegible] judgment against the body corporate in the name of "Trosilli
[illegible]merce," and that he had no knowledge of these proceedings or
[illegible] judgment on account of his business on a business trip to
[illegible]ly, from which he has only shortly returned before coming said
[illegible]tion. The court denied the motion, but on this order the
[illegible]ritable power in such a case it should have signed an the judg-
[illegible]t and permitted a defense, allowing the judgment to stand
[illegible] the meantime as security. No error is involved the motion

the judgment will be reversed with directions to open up the same to permit such defense, the judgment to stand in the meantime as security. (Kloeckner v. Schafer et al., 110 Ill. App. 391.)

REVERSED AND REMANDED WITH DIRECTIONS.

Gridley and Fitch, JJ., concur.

judgment will be reversed with directions to open up the
s to permit such returns, the judgment to stand for the
nfline as amounts. (*Lincoln v. Smith et al.*, 32 Ill.
. 381.)

REVERSED AND REMANDED WITH DIRECTIONS.

Holy and Wilson, JJ., concur.

42 - 30285

WARTBURG PUBLISHING HOUSE,
a corporation,
Plaintiff in Error,

v.

N. E. SHEPHERD,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 665

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error for the cost of printing a book called "Is Your Neighbor a KuKluxer." The trial was without a jury, and the court entered a finding and judgment in favor of defendant. The usual motions were made and denied, and this writ seeks reversal of the judgment.

The main contention is that the finding is against the weight of the evidence.

Plaintiff called two witnesses, LaVey, who solicited the order from defendant, and Lischer, its foreman, who made the estimate of the cost and concluded the oral contract for the work. Defendant was his only witness. There was no dispute as to most of the facts. LaVey testified that when he went to Shepherd to procure the order the latter handed him a sample book bearing said title and wanted him to get an estimate of the cost of printing 5,000 copies; that he took it to Lischer for an estimate which was made at $410 and returned to Shepherd; that the latter after receiving it gave LaVey the order with the request that "it be done in a hurry;" and on the next day handed him several boxes containing cards on which were written names, addresses, etc., saying he wanted such names, etc., inserted in the new book; and thereupon LaVey took the cards to Lischer and informed him of defendant's desires. This terminated his connection with the matter.

- 10289

[illegible]TAUNG KUNSLIGHING NOVUM,
[illegible]rporation,
Plaintiff in Error,

v.

[illegible], SHERMERD,
Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

24 N.E. 665

MR. PRESIDING JUSTICE BARRAS
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error sued defendant in error for the [illegible] of printing a book called "Is Your Neighbor a Sinner." [illegible] trial was without a jury, and the court entered a finding [illegible] judgment in favor of defendant. The usual motions were made [illegible] denied, and this writ seeks reversal of the judgment.

The main contention is that the finding is against [illegible] weight of the evidence.

Plaintiff called two witnesses, Levy, who solicited [illegible] order from defendant, and Liebler, his foreman, who made the [illegible] of the book and concluded the oral contract for the [illegible]. Defendant was his only witness. There was no dispute as [illegible] part of the facts. Levy testified that when he went to [illegible] to procure the order the latter handed him a sample book [illegible] said title and wanted him to get an estimate of the cost [illegible] printing 5,000 copies; that he took it to Liebler for an [illegible] which was made at $[illegible] and returned to defendant; that [illegible] after receiving it gave Levy the order with the request [illegible] "it be done in a hurry;" and on the next day handed him several [illegible] containing cards on which were written names, addresses, etc., [illegible] be wanted such names, etc., inserted in the new book; and [illegible] upon Levy took the cards to Liebler and informed him of [illegible] defendant's desires. This terminated his connection with the matter.

Lischer corroborated his evidence that he brought only the sample book for the estimate and the cards after the estimate was given, and testified that after the cards were brought to him he called up Shepherd on the telephone and told him the new book would be "much bigger," that it would contain 128 pages, whereas the old book had 64; that Shepherd then told him to put it in smaller type, whereupon Lischer said that would reduce the size but increase the cost, and defendant replied, "go ahead, he was in a hurry for the book."

The book was printed and contained 103 pages, for which the fair and reasonable and customary charge, as testified to and not questioned, was $325.61.

Defendant paid $205 on the bill, and both pleaded and testified that he was willing to pay $305 additional, the balance on the basis of said estimate. Said "balance," however, was not brought into court, and judgment should have been entered against defendant for said sum in accordance with section 55, ch. 116, (Cahill's State.) He further testified that he handed the cards to LaVey when he gave him the book, and while he admitted hearing the conversation testified to by Lischer, he denied that anything was said about "increased cost."

But we think there was a manifest preponderance of evidence in plaintiff's favor and that it was entitled to judgment for the full amount of its claim. Not only were there two witnesses against one on the disputed point when the estimate was made with reference to the order for the insertion of the contents of the cards, but the admitted parts of the conversation over the telephone tend strongly to corroborate the two witnesses to the effect that the estimate had been made and received before any suggestion was made with regard to including what was on the cards. Evidently the conversation was suggested by the very fact that the order to include additional material was made after receipt of the estimate.

Hinsdor corroborated his evidence that he brought only
a sample book for the author and the agent after the original
had given, and testified that after the agent was brought to him
, called up Chapman on the telephone and told him the new book
uld be "much bigger," that it would contain 100 pages, whereas
e old book had 64; that Chapman then told him to put it in
ollar type, whereupon Hinsdor said that would reduce the size
f increase the cost, and Chapman replied, "We mind, he was
a hurry for the book."

The book was printed and contained 104 pages, for which
fair and reasonable and customary charge, as testified to by
f witnesses, was $500.00.

Defendant paid $400 on the bill, was with plaintiff and
stified that he was willing to pay $100 additional, the balance
the basis of cost plus 15%. With "bad news," however, was not
ought into court, and judgment should have been entered against
efendant for said sum in accordance with section 56, Ga. Law,
ability's claim.) Mr Hinsdor testified that he hoped the agent
hurry when he gave him the book, and that he thought based
f conversation testified to by witness, he stated that [illegible]
e said about "lemons of cost."

But as it has been, as a matter of [illegible] reason of evi-
nce in plaintiff's favor and that it was entitled to recover
r the full amount of its claim. Let out [illegible]
ainst one on the ground that said [illegible]
[illegible] the order for the [illegible] of the [illegible]
rts, but the testimony most of the [illegible]
d strongly to indicate to the [illegible]
e contents and [illegible] by [illegible]
made with regard to furnishing what was on the cover. Although
conversation was suggested by the [illegible]
clude additional material [illegible] after receipt of the [illegible]

Otherwise there was seemingly no necessity for Lischer's calling up Shepherd, and it is far more consistent with business methods that a man in Lischer's position on receiving such order after making the estimate on the sample book alone should have spoken about the increased cost of printing additional matter. We think, therefore, the court should have entered the judgment for the full amount of plaintiff's claim, namely, $620.61, which allowed credit for the payment of $205.

Accordingly the judgment will be reversed and judgment entered here for that sum with costs of this court and in the court below.

REVERSED WITH FINDINGS OF FACTS
AND JUDGMENT HERE.

Gridley and Pitch, JJ., concur.

FINDING OF FACTS.

We find that the estimate on which defendant in error claimed the parties hereto entered into a contract was not the basis of the contract, but that defendant in error ordered the printing of additional material to that considered in the estimate, knowing that the cost would be greater than stated in said estimate and without making any specific arrangement for the cost, and that said cost was $825.61, on which defendant in error has paid $705.

53 - 30301

JOSEPH S. SWEENEY, Jr., a minor, by Joseph S. Sweeney, Sr., Defendant in Error,

v.

FREDERICK O. CLAUSEN, Plaintiff in Error.

ERROR TO SUPERIOR COURT, COOK COUNTY.

240 I.A. 665

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

The judgment under review was rendered on the verdict of a jury at an ex parte trial for $1350 against plaintiff in error, the defendant below, in an action on the case. The first, third and fourth counts of the declaration were stricken on plaintiff's motion, and the judgment stood on the second count.

The only point made for reversal is that as the fourth or last count was the only one with a formal averment of the amount of the ad damnum, the judgment, being on the second count alone, cannot stand.

The final averment of the second count is "and sustained damages as alleged in the last count of this declaration." By this reference the formal ad damnum in the fourth count became a part of the second count, and the dismissal of the fourth count did not alter that fact for it still remained a part of the declaration for reference purposes. (Shaughnessy v. Holt, 236 Ill. 485, 487.)

The judgment is affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

...ARER G. MERRITT, Jr., a minor, ...Joseph E. Smedley, Sr., Defendant in error.	ERROR TO SUPERIOR COURT, COOK COUNTY.
v.	
...ERRICK O. GLEASON, Plaintiff in error.	240 I.A. 665

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

The judgment under review was rendered on the verdict of a jury at an ex parte trial for $1500 against plaintiff in error, the defendant below, in an action on the case. The first, third and fourth counts of the declaration were stricken on plaintiff's motion, and the judgment stood on the second count.

The only point made for reversal is that as the fourth count was the only one with a formal averment of the count of the ad damnum, the judgment, being on the second count only, cannot stand.

The final averment of the second count is "and sustained damages as alleged in the last count of this declaration." In its reference the formal ad damnum in the fourth count becomes a part of the second count, and the dismissal of the fourth count is not after that fact for it still remained a part of the declaration for reference purposes. (Shoemaker v. Hall, 236 Ill. 488, 487.)

The judgment is affirmed.

AFFIRMED.

Gadby and Kitch, JJ., concur.

30332

79 - 30332

240 I.A. 665

NATIONAL ELECTRIC CONTROLLER CO., a corporation,
Appellant,

v.

HOWARD RADIO CO., a corporation, A. A. HOWARD, G. E. WARREN and T. J. SULLIVAN, partners, etc.,
Appellees.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

On the motion of defendants, plaintiff's amended statement of claim was stricken for insufficiency in that it did not state a legal cause of action against defendants. Plaintiff having elected to stand by the statement has appealed from the order dismissing the suit.

Plaintiff's claim is alleged to be for amounts due and owing under a certain contract in writing, a copy of which is attached to and made a part of the statement of claim. The original contract (Exhibit A) was executed June 1, 1922, and a supplementary agreement modifying it (Exhibit B) was executed February 1, 1923.

The main question presented is, what construction should be put upon the contract and supplementary agreement?

Exhibit A recites that plaintiff is the owner of a patent and of patented improvements in rheostats, and grants to the Howard Radio Company, "immunity from prosecution for patent infringement under said patent," subject to certain provisions not involved in this case.

The provisions of the agreement in the first two paragraphs of section B of Exhibit A, read as follows:

No. 8432

TURNER ELECTRIC CONTROLLER CO.,
corporation,
Appellant,

v.

WARD MANUF CO., a corporation,
A. HOWARD, S. ... WALKER and
J. SULLIVAN, partners, etc.,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE DUFFIN DELIVERED THE OPINION OF THE COURT.

On the motion of defendants, plaintiff's second statement of claim was stricken for insufficiency in that it did not state a legal cause of action against defendants. Plaintiff having elected to stand by the statement has appealed from the order dismissing the suit.

Plaintiff's claim is alleged to be for amounts due and owing under a certain contract in writing, a copy of which is attached to and made a part of the statement of claim. The original contract (Exhibit A) was entered Jan. 1, 1920, and a supplementary agreement modifying it (Exhibit B) was executed January 1, 1923.

The main question presented is, what construction should be put upon the contract and supplementary agreement. Exhibit A recites that plaintiff is the inventor of a certain and of patented improvements in thermostats, and grants to the Howard Radio Company, "immunity from prosecution for patent infringement under said patent," subject to certain limitations not involved in this case.

The provisions of the agreement in the first two paragraphs of section 5 of exhibit A, read as follows:

"B. In consideration of the Said Immunity, the party of the second part agrees to pay to the party of the first part or assigns, as follows:

1. The sum of Ten Cents for each and every Rheostat mentioned or enumerated in any report furnished or delivered by the partyof the second part to the party of the first part on or before the fifteenth day of the month and which Rheostats were sold by the party of the second part during the preceding month, and in which report is set forth truly in detail for each transaction, the date, the name and address of the purchaser, and the number of rheostats; the said payment to be delivered to the party of the first part with said Report; Provided, however, that if the said payment is made in full and delivered to the party of the first part with said report on or before the fifteenth day of each month, then, in each such case, the party of the second part shall be entitled to a discount of fifty (50) per cent from the amount otherwise payable for that month by the party of the second part to the party of the first part on the rheostats so reported; the net payment due hereunder in each such case for such month being five cents for each and every rheostat reported instead of ten cents, as stated.

2. The sum of one dollar for each and every rheostat containing said patented improvement, sold or in any way disposed of or used, by the party of the second part, on or before the fifth day of November, A. D. Nineteen Hundred and twenty four (1924) provided said party of the second part fails or neglects to mention and enumerate said rheostat in a report furnished and delivered by the party of the second part to said party of the first part on or before the 15th day of the month following said sale, use or disposal; and the said sum of one dollar for each rheostat shall be payable by the party of the second part to the party of the first part upon demand in writing made by the party of the first part upon or to the party of the second part."

It is this quoted part of section B as modified by the supplementary agreement (Exhibit B) that calls for construction. The modification consists of adding to said B-1 the following clause:

"and that on rheostats made or sold during the month of January, 1923, and each month thereafter the said discount shall be eighty (80) per cent instead of fifty (50) per cent from the amount otherwise payable for that month by the party of the second part to the party of the first part on the rheostats so reported on or before the 15th day of each month provided the said payment is made in full and delivered to the party of the first part with said report."

Plaintiff's claim is made up as follows:

[illegible] an overall view of the [illegible] liability, the party of the second part [illegible] in the [illegible] of the first part or assignee, as follows:

1. The sum of [illegible] for each [illegible] shall be [illegible] or delivered by the party of the second part to the party of the first part or to [illegible] the [illegible] month and within thirty days [illegible] the [illegible] second [illegible] the production [illegible], and if which report is not truly [illegible] for [illegible] the date, [illegible] number of [illegible] the party of the second part, [illegible] however, [illegible] delivered to the party of the first part [illegible] on or before the fifth [illegible] day [illegible] month, in each month date, the party of the second part shall be entitled to a discount of [illegible] (5%) per cent from the amount [illegible] plus payable, for [illegible] to the party of the first part on the [illegible] to the party of the first part on the [illegible] the month being five days [illegible] month of [illegible] instead of ten days, as stated.

2. The sum of [illegible] shall be [illegible] disposed of [illegible] before the fifth day of January, [illegible] and twenty four (1924) [illegible] part fails or neglects to [illegible] in a report [illegible] second part to said party of the first part [illegible] fifth day of the month [illegible] and the said sum of [illegible] payable by the party of the second part to the party of the first part upon or to the party of the [illegible]

It is [illegible] [illegible]

[illegible]

modification [illegible]

[illegible]

"and that [illegible] of January, 1924, and [illegible] discount shall be [illegible] (5%) per cent from [illegible] month by the party of the second part [illegible] the first part [illegible] the 15th day [illegible] made if [illegible] part with [illegible]

[illegible]

One dollar on each of 6214 sold in November, 1922	$ 6214.00
One dollar on each of 25206 sold in November, 1923	25206.00
Ten cents on each of 31209 sold in October, 1924	3120.90
Ten cents on each of 7103 sold in November, 1924	710.30
Total	$35251.20

Credits

December 15th 1922 paid by check	$312.30	
December 17th 1923 paid by check	504.12	
November 24th 1924 paid by check	766.24	1582.66
Balance due and payable		$33668.54

The facts upon which the first two items of the claim are predicated are that the Howard Radio Company did not report to plaintiff the sales made in November, 1922, until the 22nd of the following month, and of the sales made in November, 1923, until the 24th of the following month. It is plaintiff's theory that under paragraph 2 of section B it thus became entitled to be paid $1.00 for each rheostat sold instead of the lesser sum mentioned in the contract, namely, 5 cents for each rheostat sold during the year 1922, and 2 cents each for those sold during the year 1923, after having credited payments made on the basis of the latter rates.

The facts upon which the other two claims are predicated are that while the reports of the sales made in the months of October and November, 1924, were made on the 15th of the month following the month when the sales were made the reports were not accompanied with any payment. Credit, however, is given for payment made November 19, 1924, which covers the sales for October and November at the rate of 2 cents for each rheostat, but appellant claimed the right to apply such credit on the first item of the account. In other words, plaintiff claims it is entitled to the maximum rates referred to in the contract by reason of

One dollar on each of [illegible] sold in
November, 1922..... [illegible]
One dollar on each of [illegible] sold in
November, 1923..... [illegible]
Ten cents on each of [illegible] sold in
October, 1924..... [illegible]
Ten cents on each of [illegible] sold in
November, 1924..... [illegible]

Total..... [illegible]

Credits

December 14th 1922 paid by check..[illegible]
December 17th 1923 paid by check.. [illegible]
November 24th 1924 paid by check.. [illegible] [illegible]

Balance due and payable..... [illegible]

The facts upon which the first two items of the claim are
founded are that the Amerex Chemical Company did not respond
until the order made in November, 1922, until the end of the
following month, and of the order made in November, 1923, until the
of the following month. It is plaintiff's theory that under
paragraph 2 of section 4 it was a time specified to be said 1.
each Phenolent soil treated of the labor was performed in the
report, namely, 8 cents for each phenolent soil during the year 1922,
2 cents each for those sold during the year 1923, after having
filled purchase made in the hands of the Amerex Co.

The facts upon which the other two items are predicated
that while the reports of the sales were in the month of
ober and November, 1924, were made on the 15th of the month
lowing the month when the sales were made, the reports were not
companied with any payment. Credit, however, is given for
made November 14, 1924, which makes the sale for October
November at the rate of 1 cents for each phenolent, but
ellant claims the right to take such credit on the first
the account. In other words, plaintiff claims it is entitled
the maximum rate reference to in the contract by reason of

defendants' default to make reports and payments strictly on time, as provided for in the agreement.

While in construing the contract plaintiff makes subtle distinctions upon which we do not feel it necessary to elaborate in this opinion, we think the controlling question presented is whether such maximum rates should be regarded as a penalty or liquidated damages. The law on the subject, as laid down by the Supreme Court in a very similar case, that of Goodyear Shoe Machinery Co. v. Selz, Schwab & Co., 157 Ill. 186, seems to us conclusive of the question. It was there said: "Where a large sum, which is not the actual debt, is agreed to be paid in case of a default in the payment of a lesser sum which is the actual debt, such larger sum is always a penalty. * * * In doubtful cases courts are inclined to treat the stipulation as a penalty." Applying this principle the court said that the controlling question in that case was, as it is in this, "what did the parties intend should be the actual rental for the machines - which sum was to be the actual debt?" The agreement in that case provided, "that if the rents and royalties due on the first day of any month shall be paid on or before the 15th day of that month, it will, in consideration thereof, grant a discount of 50 per cent from the rents and royalties specified in the schedule aforesaid." Commenting on that provision the court said, "that a discount of 50 per cent should be made on the debt for a prepayment of about 15 days is contrary to all business experience, and most unreasonable." It said that inasmuch as not more than 50 per cent of the schedule rate was due and payable at any time between the first and 15th of the month, and as the presumed intention of the parties was to secure a reasonable compensation, to hold that it was intended that the rent should be a particular sum when due, and double that on the next day, "except as an inducement to prompt payment of the lesser sum," is unreasonable. The court construed the lesser sum

fendants'

ms, as provided

btle distinctions

aborate in this opinion,

esented is whether such

nalty or liquidated

on by the Supreme Court

adway Wine Exchange Co.

and to us conclusive

there a larger sum,

paid in case of a

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to be the actual debt, and that the agreement to pay double the amount was in the nature of a penalty to insure prompt payment of the sum actually agreed to be paid.

We place a like construction upon the contract in the instant case. The smaller sum, on the basis of the lesser rates mentioned, must be considered as the actual debt, which seems to have been paid, though after the time contemplated by the agreement, and the provisions for the larger rates must be deemed in the nature of a penalty to insure prompt payment of the actual sum due. There is nothing in the statement of claim to show that plaintiff suffered any actual damages and nothing upon which to predicate a claim therefor.

In this view of the case we need not discuss whether the statement of claim shows a joint liability of defendants for the performance of the contract. Nor do we think it makes any difference whether the amount to be paid under the contract is regarded as a royalty or consideration from immunity from prosecution for patent infringement. The effect and substance of the contract are the same in either case. The real question is, what did the parties intend should be the actual payment or actual debt for the rheostats. The final phrase of paragraph 1, section B, "the net payment due hereunder," referring as it does to the rate of 5 cents, instead of ten cents, subsequently reduced to 2 cents, supports the construction that the amount due according to the lesser rate, constituted the actual amount due and, therefore, the actual debt. The larger sum was to be paid only in case of default, and which, according to the decision cited, and other cases therein referred to, must be construed as a penalty. The correspondence referred to in the statement of claim, attached as exhibits, indicates that plaintiff had received and accepted payments made on the basis of the smaller sum, and that after the contract had terminated it asserted its claim on the basis

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ount was in the nature of a penalty to insure prompt payment
the sum actually agreed to be paid.

We place a like construction upon the contract in the
ent case. The smaller sum, on the basis of the longer term
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t, and the provisions for the larger terms must be deemed in
nature of a penalty to secure prompt payment of the normal
due. There is nothing in the statement of claim to show that
ntiff suffered any actual damages and nothing upon which to
ntitate a claim therefor.

In this view of the case we need not decide whether
statement of claim shows a joint liability of defendants for
performance of the contract. For do we think it makes any
ference whether the sums to be paid under the agreement in
uestion should be regarded as a penalty or liquidated damages for breach of
contract. The plaintiff and employer of the defendants
the same in either case. The real question is, just did the
ties intend should be the actual damages for breach of the
ntract. The final phrase of paragraph 3, reading, "the
payment due hereunder," refers only to the date of
ment, instead of the amount. Accordingly reading it as a penalty,
ours the conclusion that the parties intended to fix
ear rate, constituted the actual damages. Therefore,
normal debt. The larger sum is a penalty and in excess of
ment, and which, according to the decisions cited, can not
ce therein referred to, must be considered void. The
ranspondence referred to in the statement of claim, although
exhibits, indicates that a joint liability was contemplated
ments made on the basis of the original debt, and in other
contracts had contemplated it should be the same as the sums

of payments provided for in case of default, thus increasing its claim in some instances from 2 cents to $1.00 on each rheostat. The very unconscionableness of the claim suggests that the above construction of the contract is a proper one.

AFFIRMED.

Gridley and Fitch, JJ., concur.

payments provided for in case of default, that Inter-Ocean claim no more insurance from Y could be [illegible] accepted. The only unconstitutionality of the [illegible] is that the above construction of the contract is a reasonable one.

[illegible]

Hadley and Pitts, JJ., dissent.

100 - 30358

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	
JOSEPH SOLTIS, Plaintiff in Error.	240 I.A. 665

MR. PRESIDING JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted of a misdemeanor without an arraignment or plea and was refused a trial by jury. That this state of the record necessitates a reversal of the judgment, involving, as such omission and refusal do, fundamental rights and elementary principles of practice, should require no citation of authorities. But the necessity of the former is stated in Parkinson v. People, 135 Ill. 401, 402, and the right to the latter is stated in Brewster v. People, 183 Ill. 143. Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

[illegible] v. [illegible]

[illegible] OF THE STATE OF ILLINOIS,
Defendant in error.

v.

[illegible] SOCIETY,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Mr. [illegible] DELIVERED
WILLIAMS FOR DEFENDANT IN ERROR.

Plaintiff in error was convicted of a misdemeanor [illegible]thout an arraignment or plea and was refused a trial by [illegible]ry. That this state of the record demonstrates a material [illegible] the judgment, involving, in such situation, the federal de[illegible] fundamental rights and elementary principles of procedure, [illegible]ould require no citation of authorities. But the recently [illegible] the former is stated in Frankfurter v. People, 147 Ill. [illegible]OR, and the right to the latter is stated in Thompson v. [illegible]ooks, 183 Ill. 164. Accordingly the judgment will be [illegible]eversed and the cause remanded.

REVERSED AND REMANDED.

[illegible]ridley and Vitch, JJ., concur.

56 - 30303

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

LOUIS HEISTINGER,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

240 I.A. 665

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was sentenced to the House of Correction upon his plea of guilty to an information charging him with operating an automobile on a public highway in Chicago while intoxicated, in violation of section 41 of the Motor Vehicle Act.

He first contends that the section of the statute mentioned is doubtful or conflicting in meaning "and impossible of elucidation." From the argument of his counsel, the point seems to be that "intoxication" may have several meanings, depending upon whether the cause of it is poison, or joy, or intestinal disturbances, or overindulgence in liquor. We find no such difficulty in construing the statute. The statute makes it an offense, punishable by fine or imprisonment in the County jail, or both, for any person to operate a motor vehicle upon any highway in this state "while drunk or intoxicated." The information omits the word "drunk," and merely charges defendant with operating such a vehicle "while intoxicated." The statute uses the word "intoxicated" as synonymous with the word "drunk." These words are synonymous if the intoxication is produced by strong drink. Unless qualified, that is the usual, ordinary sense in which the words are used, as a reference to any standard dictionary will show. The objection is without merit.

[illegible] PEOPLE OF THE STATE OF
[illegible] ILLINOIS,
Defendant in Error,

v.

[illegible] MINISTER [illegible],
Plaintiff in Error.

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT:

Plaintiff in error was convicted in the Court of [illegible] protection upon his plea of guilty to an information charging him with operating an automobile on a public highway in Illinois while intoxicated, in violation of section 11 of the Motor Vehicle Act.

[illegible] He first contends that the portion of the statute [illegible] mentioned is confusing or conflicting in stating "and incompatible [illegible] intoxication." From the language of this contest, the point [illegible] to be that "intoxication" may have several meanings, [illegible] whether the cause of it is a poison, or joy, or [illegible] disturbance, or overindulgence in liquor. We find [illegible] difficulty in construing the statute. The statute [illegible] it an offense, punishable by fine or imprisonment in the [illegible] jail, or both, for any person to operate a motor vehicle [illegible] any highway in this state while under the influence [illegible]." [illegible] information with the word "drunk," and merely charges [illegible] with over-time upon a vehicle while intoxicated." [illegible] statute uses the word "intoxicated" in apposition with [illegible] word "drunk." These words are synonymous if the in- [illegible] is produced by strong drink. Other words, however, [illegible] the usual, ordinary sense in which the words are used, [illegible] reference to any standard dictionary will show. The [illegible] without merit.

It is next objected that the written jury waiver which was filed in the Municipal court, does not state the name of the offense charged. Conceding this to be true, it is immaterial. The plea of guilty admitted all the material facts alleged in the information (Marx v. The People, 204 Ill. 248), and, in legal effect, waived the defendant's right to a jury trial. (Harris v. The People, 128 Ill. 585, 591.) Hence, there was no necessity for a formal jury waiver.

It is next insisted that neither in the finding of the court nor in the mittimus is there any statement of venue. Defects in the mittimus cannot be raised on a writ of error, as the mittimus is no part of the judgment (Marx v. The People, supra); and upon a plea of guilty the statute does not require that the court shall render any verdict, or shall (in any manner other than by a sentence) make a finding as to the facts of the case. (Ibid., 252.) However, the record of the judgment shows that the court did enter a finding that defendant is "guilty in manner and form as charged in the information herein," and the information states the venue.

It is finally urged that the Municipal court has no power to commit plaintiff in error to the House of Correction. The statute expressly provides the contrary. (Cahill's Ill. Stat. 1925, Chap. 67, Sec. 9.)

The alleged constitutional questions mentioned in the brief of counsel for plaintiff in error were waived by coming to this court and assigning errors which this court has power to consider and determine. (Luken v. L. S. & M. S. Ry. Co., 248 Ill. 377.)

The judgment is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

It is next objected that the written jury verdict which filed in the municipal court, does not state the name of offense charged. Conceding this to be true, it is immaterial. plea of guilty admitted all the material facts alleged in the formation (State v. The Justice, 104 Ill. 486), and, in legal fect, waived the defendant's right to a jury trial. (Martin v. Florida, 180 Ill. 280, 283.) Hence, there was no necessity a formal jury waiver.

It is most immaterial that mistake in the finding of the ert now in the attitude to state any statement of venue. Defects the pleadings cannot be raised on a writ of error, as the ction is no part of the judgment (Mark v. The People, supra); upon a plea of guilty the statute does not require that the rt shall render any verdict, or shall (in any manner other an by a sentence) make a finding as to the facts of the case. ld., 283.) However, the record of the judgment shows that the urt did enter a finding that defendant is "guilty in manner and rm as charged in the information herein," and the information ates the venue.

It is finally urged that the municipal court has no power ermit plaintiff in error to the 2 use of "prosecutor". The statute expressly provides the contrary. (Smith's H. . Stat. 1908, Crim. Proc. 8.)

The alleged constitutional questions mentioned in the brief counsel for plaintiff in error are raised by coming to this court l neglecting errors which state more than power to construe and ownstrue. (Mann v. L. S. & M. S. R. Co., 104 Ill. 227.)

The judgment is affirmed.

AFFIRMED.

Brown, P. J., and Gridley, J., concur.

88 - 30344

6032

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOSEPH C. WOLON,
Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

240 I.A. 66

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Defendant was convicted, in the Criminal court of Cook county, of conspiracy and sentenced to sixty days in jail. On this writ of error, he claims that the evidence against him was insufficient to justify the conviction and that certain prejudicial errors were committed in the admission of evidence.

In order that such alleged errors may be considered by this court, it was necessary to show the evidence and the rulings of the trial court by a proper bill of exceptions. (Mallers v. Whittier Machine Co., 170 Ill. 434; Kalish v. City of Chicago, 219 Ill. 133.) There appears in the record a document which is called an original bill of exceptions, but the typewritten certificate at the end of it, intended for the signature of the trial judge, is not signed, and the space left for the date is blank. Under this blank form of certificate, and on the same page, appears the following.

> "The trial judge, Gemmill, being absent and not holding court, this bill of exceptions presented to me in open court for settlement and signature this 29th day of July, 1925.
>
> Hosea W. Wells,
> Judge."

Immediately below this statement is the file mark of the clerk of the Criminal court (the same date), and at the bottom of the same page the following is written: "Note - Exhibits not in bill of exceptions; otherwise it is O. K. W. N. Gemmill." When this memorandum was written does not appear. It may have

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

HERMAN O. WOLKEN, Plaintiff in Error.

ERROR TO CRIMINAL COURT OF COOK COUNTY.

MR. JUSTICE RYAN DELIVERED THE OPINION OF THE COURT.

Defendant was convicted, in the Criminal Court of Cook County, of conspiracy and sentenced to sixty days in jail. On writ of error, he claims that the evidence against him was insufficient to justify the conviction and that certain prejudicial errors were committed in the admission of evidence.

In order that such alleged errors may be considered by this court, it was necessary to show the evidence and the rulings of the trial court by a proper bill of exceptions. (Bailey v. Whitter Knitting Co., 140 Ill. 494; Kelley v. People, 115 Ill. 192.) There appears in the record a document which is called an original bill of exceptions, but the typewritten certificate at the end of it, intended for the signature of the trial judge, is not signed, and the space left for the date is blank. Under this blank form of certificate, and on the same page, appears the following:

> "The trial judge, Cunnell, being absent and not holding court, this bill of exceptions presented to me in open court for settlement and signature this 15th day of July, 1922.
>
> Moses . Cohn,
>
> Judge."

Immediately below this statement in the file mark of the clerk of the Criminal court (the same d. m), and at the bottom of the same page the following is written: "Ex. - Exhibits in bill of exceptions; offered & it is O. K. - . H. Cunnell."

Upon this memorandum [illegible] bill can not appear. It may have

been written before it was filed or weeks later, after the time allowed within which to file it had expired. It purports to show, not that the bill is correct and complete, but that it was neither, at the time the memorandum was written. At least one of the exhibits mentioned in the document is still missing, and we must therefore assume that after the trial judge's memorandum was written on it, the bill was never so corrected that it could be signed and certified to by the trial judge. As it stands, it is a mere draft of a proposed bill of exceptions which has never been completed, or certified and signed as such by any judge authorized to sign it, and is therefore not properly a part of the record. (People v. Rosenwald, 266 Ill. 548; In Re Est. of Martha Jamett, 199 Ill. App. 13.)

The state's attorney has not made any motion to strike this so-called bill of exceptions from the record, but as the errors assigned relate wholly to matters that can only be made to appear by a bill of exceptions properly signed and certified as such by the trial judge, we have no power to review anything contained in the purported bill of exceptions. (Senger v. Pfeiffer, 199 Ill. App. 190) even though it improperly appears in the transcript. There is no assignment of error which calls in question any matter shown by the record apart from the purported bill of exceptions, and therefore the judgment must be affirmed, and it is so ordered.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

n written before it was filed or weeks later, after the time
owed within which to file it had expired. It purports to
w, was that the bill is correct and complete, but that it was
ther, at the time the memorandum was written. I find one
the exhibits mentioned in the decrees is still missing, and
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a mere draft of a proposed bill of exceptions which has never
n completed, or certified and signed as such by any judge
horized to sign it, and is therefore not properly a part of
record. (Hoggle v. Hoggle, 90 Ill. App. 15; In re Hall, 2
the Length, 190 Ill. App. 15.)

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e so-called bill of exceptions from the record, but as the
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ear by a bill of exceptions properly signed and certified as
n by the trial judge, we have no power to review anything com-
ed in the purported bill of exceptions. (Bonner v. Hoffner,
Ill. App. 190) even though it improperly appears in the
nscript. There is no assignment of error which calls in
estion any matter shown by the so-called bill of exceptions, and therefore the judgment must be affirmed,
d it is so ordered.

AFFIRMED.

mes, P. J., and O'Malley, J., concur.

5034

108 - 30366

INTERNATIONAL ACCOUNTANTS SOCIETY, a corporation, Appellant, v. JOHN A. SCHULER, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 666

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

By this appeal, plaintiff seeks, in effect, to obtain a new trial of an action on a note given by defendant in March, 1922, for $140, for instruction in accountancy to be thereafter given by plaintiff. The defense was failure of consideration. The case was tried before a jury, which found the issues against the plaintiff. No brief has been filed by the defendant.

Plaintiff's abstract and brief make it appear that there was really no defense to the suit and that the court erred in refusing to direct a verdict for the plaintiff. An examination of the transcript, however, shows there was a good defense.

When the note was given, plaintiff agreed in writing - and this agreement was the sole consideration for the note - to furnish defendant with its "complete I. A. S. elective course," consisting of ninety lessons, of which the first ten were "fundamental accounting principles." For that purpose, plaintiff agreed to furnish defendant with "all necessary lesson and instruction material," in loose leaf form, with a convenient binder, each lesson to be complete in itself and to have an examination sheet attached to it. The agreement further provides that "when the student's examinations are received, they are carefully examined, criticized and graded by practicing certified public accountants and returned to him with a completely worked out model answer, with such personal criticism, counsel and advice as the student may require." The agreement also provides:

"Our staff of Consulting Accountants is ready at all times to furnish unlimited personal advice as to the proper solution of problems arising in connection with the course of study for a period of five years from the date of enrollment. They are also willing to assist in solving accounting difficulties arising in the student's daily work." These provisions are printed under a heading which reads: "A Partial List of Professional and Business Authorities Connected with the International Accountants Society," followed by about thirty names bearing titles of "C. P. A."

The defendant testified, without contradiction, that when he executed the note in question, he received about six pamphlet "lessons" from the defendant; that soon after, he became sick with pneumonia and was unable to continue for some time; that when he recovered, he found he "could not analyze the first lesson" and went over to the school with it and "tried to get some help;" that he there met a Mr. Peterson, "the credit manager or something; that he told Peterson he could not understand the lesson and asked for assistance; that Peterson refused to give him any assistance and told him; "The lessons had to be turned in, they could not be helped out personally in school." Defendant testified that his lessons were not "turned in" because he could not understand them, and because of this refusal to help him, and that he then told Peterson to apply the $20 he had already paid in advance "on some other student's tuition," and that Peterson replied: "It could probably be done."

Some of this testimony does not appear in the abstract. It is in the record, however, and is uncontradicted. In view of it, we are of the opinion that plaintiff's contention that the verdict is not supported by the evidence is without merit. From this undisputed testimony, the jury might well find that the consideration for the note had failed.

The judgment is affirmed. AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

91 - 30347

PEOPLE ex rel. MAX U. MAGOR,
Appellee,

v.

CITY OF CHICAGO and WILLIAM E. DEVER, Mayor, and MORGAN A. COLLINS, Superintendent of Police of said City,
Appellants.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

240 I.A. 665

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

From an order entered by the Circuit court on May 22, 1925, granting a peremptory writ of mandamus, as prayed, commanding respondents to restore to the relator certain revoked licenses, this appeal is prosecuted. To the relator's petition, filed April 20, 1925, the respondents filed a general demurrer which the court overruled. Upon their electing to stand by the demurrer the court ordered that the writ issue.

The petition alleges that the relator, a resident of Chicago for many years, is a person of good moral character and reputation; that he owns and operates in the city many drug stores in which he conducts an ice cream soda fountain business and a retail cigarette business; that some of these stores he has operated for 18 years; that on May 1, 1923, he leased from one Shapiro a store located at 7640 North Pauline street for a period of 10 years; that under this lease he can there only carry on a drug business, together with the sale of ice cream and cigarettes and tobacco in all its forms, and that it is impossible for him to successfully do so without the sale of ice cream and cigarettes as an adjunct; that at various times prior to January 1, 1925, he applied for and obtained the required licenses for the sale of such articles in each of his drug stores for the calendar year of 1925;

No. 2021 - SCHAFF

[illegible] on [illegible]. [illegible],
Appellants,

v.

CITY OF [illegible] and [illegible],
MAYOR, Mayor, and [illegible] R. COLLINS,
Superintendent of Police of said city,
Appellants.

No. 2021. - [illegible] RULINGS. - [illegible] DIVISION - [illegible].

[illegible] from an order entered by the Criminal Court of [illegible], 1948, granting a peremptory writ of mandamus, [illegible], commanding respondents to [illegible] to the relator [illegible], 1948, [illegible] this appeal is prosecuted. To the relator's petition, filed [illegible] April 20, 1948, the respondents filed a general demurrer [illegible] the court sustained. Upon such ruling [illegible] the court entered the [illegible].

The petition alleges that the relator, [illegible] Chicago for many years, is a member of good moral character and reputation; that he [illegible] and [illegible] stands in good [illegible] and a totally disabled veteran; that [illegible] operated for [illegible] years; [illegible] March 1, 19[illegible], he [illegible] a taxi license [illegible] at 20 years; that [illegible] March 19[illegible] [illegible] business, [illegible] of [illegible] 20 years [illegible] taxicabs in all 19[illegible] [illegible] unacceptability of [illegible] [illegible] to be efficient; that on a [illegible] March 1, 1948, he applied for and obtained the [illegible] 19[illegible] [illegible] [illegible] 1948;

that on December 28, 1924, he obtained the required licenses for said year for the sale of such articles in the drug store on North Paulina street, paying the proper license fees; that at this time there were in force, and are now, two ordinances of the City relating to the issuance of licenses for the sale of such articles (copies of said ordinances are attached to the petition as exhibits "A" and "B"); that since January 1, 1925, relator has been selling such articles in said store under and by virtue of said licenses; that, although he "at no time violated any of the provisions of either of said ordinances," nevertheless, the Mayor of the City, William E. Dever, "without any cause whatsoever," entered an order on April 21, 1925, revoking said licenses, and notice of such revocation was served upon relator on April 22, 1925, as shown by copy attached (exhibit "C"); that the licenses were taken away from the premises by the Superintendent of Police of the City and relator has since been served with a writ charging him with violations of said ordinances in selling said articles without license; that such actions on the part of respondents are "arbitrary, wrongful, discriminatory and without legal excuse;" that by reason thereof relator has suffered and will continue to suffer great loss and injury in his business, etc; and that unless said licenses are restored he will be unable to continue his drug business on the premises.

Attached to the petition, as exhibits, are copies of two ordinances of the City, relating to licenses for the sale of cigarettes and to licenses for engaging in the business of keeping ice cream parlors, and also a copy of a written notice, signed by the Mayor and dated April 21, 1925, that the licenses issued to the relator, at No. 7640 N. Paulina Street, "have this day been revoked by me, on recommendation of the Gen'l Supt. of Police." According to the

that on December 20, 1944, he granted the vending licenses for said year for the sale of such articles in the Long Beach on North Pacific street, during the proper license fees; that at that time there were in force, and at now, the ordinances of the City relating to the issuance of licenses for the sale of such articles (copies of said ordinances are attached to the petition as exhibits "A" and "B"); that since January 1, 1945, relator has been selling such articles in said street under and by virtue of said licenses; that, although he "is in no way violating any of the provisions of either of said ordinances," nevertheless, the Mayor of the City, William C. Byers, "without any notice to relator," entered an order on April 11, 1945, revoking said licenses, and ordering of such revocation was served upon relator on April 11, 1945, as shown by copy attached (and marked "B") that the licenses were taken away from the stand on by the revocation of licenses of the City and relator has since been driven off the street, thus depriving him with violations of said ordinances by selling articles without licenses; that such actions on the part of the Mayor are "arbitrary, capricious, unreasonable, tyrannical and unjust"; that by reason thereof relator has suffered and will continue to suffer great loss and injury in his business, and that unless said licenses are restored he will be unable to continue his usual business on the premises.

Upon the petition, [illegible] copies of the ordinances of [illegible] relating to the issuance of licenses [illegible] the grant, or the refusal to grant, licenses for the sale of such articles, and the revocation of such licenses, the Mayor and Council, on the 20th day of December, 1944, and the Council, on the 11th day of April, 1945, acted in the matter, as a reconsideration of the first order, as relator, according to the

copy of the ordinance, relating to a license for the sale of cigarettes, provision is made for the filing of a written application therefor by the person desiring it, and it is further provided that, "if the Mayor shall be satisfied that such person is of good character and reputation and suitable to be entrusted with the sale of cigarettes, he shall cause the City Clerk to issue a license upon payment * * of a license fee," etc.; and that "every such license shall expire on the 31st day of December following the date of its issuance;" and that

> "No person shall sell or give away any cigarettes to any person under the age of twenty-one. Any person who shall violate this section shall be fined not less than $25 for each offense. The Mayor may revoke any license issued under this chapter whenever it shall appear to his satisfaction, from the recommendation of the Superintendent of Police or otherwise, that the licensee has violated any of the provisions of this section."

The sole question for our consideration on this appeal is whether the petition states such a case for the issuance of the writ as requires the respondents to file an answer thereto, setting forth the facts upon which the Superintendent of Police acted in recommending the revocation of relator's licenses and upon which, following the recommendation, the Mayor revoked the same. After a careful review of the petition we think it states a case which is prima facie good. (Springfield & Illinois Ry. Co. v. County Clerk, 74 Ill. 27, 31.) Although it is well settled that a demurrer to a petition for mandamus, as to a declaration or complaint at law, admits only such facts as are well pleaded and that statements of conclusions may be disregarded (People v. Busse, 348 Ill.11, 17), we think that the allegations, viz, that the relator "at no time violated any of the provisions of either of said ordinances" and that the Mayor revoked the licenses "without any cause whatsoever," taken in connection with other allegations contained in the petition, sufficiently state such a prima facie case as requires an answer.

copy of the ordinance, [illegible] a license for the sale of signatures, provided he made [illegible] the filing of a written application therefor by the person [illegible] provided that, "if the Mayor shall be satisfied that such person is of good character and reputation and suitable to be entrusted with the sale of [illegible], he shall cause the City Clerk to issue a license upon payment [illegible] license fee," [illegible] "every such license shall expire on the [illegible] following the date of its issuance;" and that

> "No person shall sell or give away any [illegible] to any person under the age of [illegible]. Any person who shall violate [illegible] shall [illegible] for each offense. [illegible] license issued under this chapter [illegible] revoked [illegible] of the [illegible] of the provisions of this [illegible]."

The [illegible] question [illegible] is whether [illegible] as required the [illegible] the facts upon [illegible] commencing [illegible], following [illegible] careful review of the [illegible] is prima facie [illegible]. [illegible] 74 Ill. [illegible] petition [illegible] that [illegible] conclusion [illegible] 11, [illegible] we think [illegible] violate [illegible] the Mayor [illegible] taken [illegible] sufficiently [illegible] prima facie [illegible]

We are of the opinion, however, that there should be a hearing upon the merits. We regard the allegations in the petition, viz, that the actions of respondents in reveking and taking away said licenses were "arbitrary, wrongful, discriminatory and without legal excuse" as being mere conclusions, which the demurrer did not admit. It is therefore ordered that the judgment of the Circuit court awarding the writ be reversed and the cause remanded with directions to that court to allow respondents to file an answer to the petition, if they shall so desire, and have a hearing upon the merits; otherwise to re-enter the order for the writ as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Fitch, J., concur.

We are of the opinion, however, that there should be a hearing upon the merits. We regard the allegations in the petition, viz. that the actions of respondents in revoking and taking away said licenses were "arbitrary, wrongful, discriminatory and without legal excuse" as being sufficiently conclusive, which the demurrer did not admit. It is therefore ordered that the judgment of the Circuit court sustaining the writ be reversed and the cause remanded with directions to that court to allow respondents to file an answer to the petition, if they shall so desire, and have a hearing upon the merits; otherwise to re-enter the order for the writ as prayed.

REVERSED AND REMANDED WITH DIRECTIONS.

Barnes, P. J., and Fitch, J., concur.

26 - 30259

UNION CONTRACTING CO.,
a corporation,
Complainant,

v.

WASHINGTON CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt
proceedings against PETER S.
SHAUGHNESSY,
Respondent and Appellant.

Consolidated with similar appeals
of CHARLES L. WILDE, No. 30260;
JOHN CAMPBELL, No. 30261;
JOHN J. STRETCH, No. 30262.

240 I.A. 667

Consolidated appeals

from Superior Court

of Cook County.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

By these several consolidated appeals, it is sought to reverse an order or decree of the Superior court, entered January 17, 1925, wherein the four respondents were adjudged guilty of contempt of court for wilfully violating a temporary injunction, issued in said chancery cause on May 13, 1924, and respondents, Shaughnessy, Wilde and Campbell were ordered to pay fines of $500, $50 and $300 respectively, and the costs of the proceedings, and to be confined in jail (not exceeding six months) until payment thereof or until discharged according to law, and respondent, Stretch, was sentenced to jail for a term of 30 days or until released according to law.

Complainant's sworn bill, filed the same day the injunction was issued, made the Washington Construction Co., the United Order of Bricklayers and Stone Masons of Chicago, Local No. 21, of Illinois, (hereinafter referred to as the

UNION CONTRACTING CO.,
a corporation,
Complainant,

v.

WASHINGTON CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt proceedings against ERNEST E. SHAUGHNESSY,
Respondent and Appellant.

Consolidated with similar appeals of CHARLES L. WILLIS, No. 30890; JOHN CAMPBELL, No. 30891; JOHN J. STANTON, No. 30892.

SPECIAL SET

Consolidated appeals

from Superior Court

of Cook County.

MR. JUSTICE SCHAEFER DELIVERED THE OPINION OF THE COURT.

By these several consolidated appeals, it is sought to reverse an order or decree of the Superior Court, entered January 17, 1958, wherein the four respondents were adjudged guilty of contempt of court for willfully violating a temporary injunction, issued in said chancery suite on July 12, 1954, and requiring Shaughnessy, Willis and Campbell were sentenced to pay fines of $500, $50 and $100 respectively, and the costs of the proceedings, and to be confined in jail (not specified the sentence) until payment should be made; or until discharged in accordance with law, and respondent, Stanton, was sentenced to jail for a term of 30 days or until released in accordance with law.

Complainants's sworn bill, filed the same day the injunction was issued, made the Washington Construction Co., the United Union of Bricklayers and Allied Trades of Illinois, Local No. 21, of Illinois, (hereinafter referred to as the

"Bricklayers' Union") and others, including Shaughnessy and Stretch and a certain Laborers' Union, parties defendant. The bill alleged in substance that complainant was engaged in business in Chicago in constructing sewers, man-holes and catch basins; that prior to April 23, 1924, it had entered into certain sub-contracts with certainccontractors to construct or repair certain sewer work in Chicago, which said contractors had agreed to do for the City of Chicago; that for the completion of said sub-contracts complainant was required to employ numerous laborers and bricklayers for several months at a large cost, had already expended considerable sums and on April 23rd had employed several workmen, members of one or the other of said unions; that complainant always had complied with the lawful rules and regulations of the unions and was ready and willing to continue so to do; that the defendant, Washington Construction Co. was engaged in Chicago in a business similar to complainant's, and for several years had had a monopoly in certain sewer work, maintained by means of controlling the supply of laborers and bricklayers in connection with the Bricklayers' Union and the Laborers' Union; that said Washington Co., the two defendant unions and certain individual defendants (naming them) had conspired together to deprive any competitior of the Washington Co. of a supply of laborers and bricklayers, by ordering members of said unions, under penalty of a fine or suspension, not to work for such competitor; and that about April 23, 1924, said last named defendants (including Shaughnessy and Stretch) conspired among themselves and with others to injure complainant by depriving it of its supply of workmen in the open market, and for the purposes of preventing it from carrying out its sub-contracts, of maintaining said monopoly of the Washington Co., of exterting money from complainant, and for other unlawful purposes. The bill then alleged certain specific acts done by certain defendants and others, in furtherance of said conspiracy, on April 23rd, May 6th, and May

"Brilliant-poor' Union" and stores, including employees and
officers and a certain "concerned" union, receive defend ed. The
bill allowed in advisory that conditions [illegible] in the lights
in Chicago in consumers like [illegible] and other business;
that prior to April 20, 1941, [illegible] been a state con-
centrate with [illegible] to [illegible] or provide certain
areas were in Chicago, [illegible] for
the City of Chicago; [illegible] of [illegible]
complainant [illegible] employ [illegible] and bring
injury for several months [illegible] and [illegible]
considerably [illegible] and on April 20, and employer [illegible]
members of [illegible] of said unions; that [illegible]
had complied with the [illegible] of the [illegible]
and was ready and willing to continue to do; [illegible]
Washington Convention [illegible] in Chicago is a business
matter to complainant; and for several years [illegible]
in northern [illegible] work, maintaining [illegible]
of labor [illegible] years in [illegible] with the [illegible]
Union and the [illegible] Union; [illegible]
defendant unions and certain [illegible]
had complained [illegible] to operate [illegible] of the [illegible]
Co. of a supply of [illegible] by [illegible]
of said unions, [illegible]
for such conversation; and that [illegible] April [illegible]
defendants (including [illegible]
unions and [illegible] to [illegible]
supply of [illegible] in the [illegible]
voiding it from [illegible]
said [illegible]
conclusions, and [illegible]
alleged certain [illegible]
in furtherance of such [illegible]

7th, all of which injured complainant, and charged that unless similar acts were restrained it would suffer irreparable injury, etc. and prayed for an injunction without notice.

Following the language of the prayer, the court ordered a writ of injunction to issue, upon complainant giving a certain bond (which was given), restraining defendants, and all persons assisting them or conspiring with them, (a) from commanding, threatening or coercing any person not to enter or remain in complainant's employ; (b) from talking to, arguing with, or dogging the footsteps of any person against his manifest will for the purpose of preventing him from entering or remaining in complainant's employ; (c) from ordering, causing, engaging in or maintaining any strike or boycott against complainant in furtherance of the conspiracy mentioned in the bill; (d) from loitering or being unnecessarily in the vicinity of street improvement jobs, upon which employees of complainant are working, and, by the display of numbers, threats, jeers, opprobrious epithets, etc., preventing or attempting to prevent any person from entering or remaining in complainant's employ, or interfering or attempting to interfere with complainant, its agents or employes, in the performance of its work; and (e) from attempting, encouraging, assisting, or participating in any way, in the doing of anything in furtherance of the conspiracy, or anything forbidden herein.

A joint and several answer to the bill was filed by the Bricklayers' Union and other defendants, including Shaughnessy and Stretch, in which they denied all material allegations of the bill. The Laborers' Union and other defendants also filed their answer, making denials, etc., as did the Washington Co. and other defendants.

On June 25, 1924, after notice, complainant filed a verified petition, supported by affidavits of several of its employees and others, alleging various willful violations of the

VIII, all of which involved complainants, as charged in the, which similar acts were committed in which multiple injunction, etc. are proved for in supporting claimant's motion.

Following the language of the proviso, the court directed a writ of injunction to issue, upon complainants giving a certain bond (which was given), and stating the conditions, and all persons assisting them or conspiring with them, (a) from committing, threatening or causing any person not to enter or remain in complainants employ; (b) from talking to, visiting with, or molesting the footsteps of any person in their employ; all for the purpose of preventing their business or their business in complainants employ; (c) from entering, working, employing in or assisting any entire or boycott against complainant in interference of the operating conditions in the mill; (d) from intercepting or taking commodities in the vicinity of their employees; upon their employees of mill in question, or, by the employment of violence, threats, guards, conferences with the, etc., intimidation or to prevent any person from entering or remaining in said mill employ, or assaulting or threatening to injure, with complaints, the agents or employes, in the performance of the work, from attempting, threatening, said men, or persuading, in the, to the doing of anything to the injury of the, or interfering, or interfering therein.

A joint [illegible] by the [illegible] defendants' counsel [illegible], [illegible] and therein, in which they [illegible] the mill. The [illegible] and other [illegible] the [illegible] manner, making [illegible] defendants.

On June 15, 1919, after notice, and [illegible] verified pleadings, supported by affidavits on [illegible] employees and others, [illegible] [illegible] of the

injunction writ, after service or knowledge thereof, by the Bricklayers' Union and said Stretch, and praying for a rule upon them to show cause why they should not be punished for contempt. Such rule was entered and on July 12, 1924, the Union and Stretch filed separate verified answers, in which each denied in detail the charges. On October 8, 1924, after notice, complainant filed a second verified petition, supported by affidavits of certain of its employes and others, alleging other willful violations of the injunction by the Union and, after knowledge of the injunction, by other named respondents, including Shaughnessy, Wilde and Campbell, and praying for a rule upon each to show cause, etc. Such rule being entered, verified answers were filed thereafter by said respondents, in which each denied all alleged violations. On October 29, 1924, on complainant's motion, the court ordered that the two petitions, and answers thereto, be consolidated as one cause, and that the same be referred to a master to take proofs and report his conclusions of law and fact. There was a hearing before the master, at which many witnesses testified for complainant, and respondents, Shaughnessy, Wilde and Campbell testified in their own defense and that of the Union. Another respondent, Thomas Healy, also testified. On December 19, 1924, the master, after overruling objections to his report by certain respondents, and by complainant to portions thereof, filed the report, in which, after making many findings, he recommended that the respondents, the Bricklayers' Union and Thomas Healy, be discharged, but that a decree be entered as to said respondents, Stretch, Shaughnessy, Wilde and Campbell, finding each guilty of willful violations of said injunction in the particulars as set forth in the report, and further recommended that each be punished by the court. It was ordered that the objections stand as exceptions before the court, and on January 17, 1925, the order or decree appealed from was entered, in which the court overruled all exceptions, approved the master's report and made many findings

injunction said, either partial or invalidate [illegible] by the Metropolitan Union and said [illegible], and property for a mile down there to show cause why they should not be punished for contempt. Such rule was received and on July 12, 1924, the Union and [illegible] filed separate verified answers, in which each denies in detail the charges. On October 6, 1924, after notice, complainant filed a second verified petition, supported by affidavits of certain of the employees and others, alleging other willful violations of the injunction by the Union and, after knowledge of the injunction, by other known nonmembers, including chauffeurs, aides and Campbell, and praying for a rule upon each to show cause, etc. Such rule being entered, verified answers of the Union officers and responsibility by each defendant all charged violations. On October 29, 1924, on complainant's motion, the court ordered that the two petitions, and answers thereto, be consolidated as one cause, and that the same be referred to a master to try the issues and report his conclusions of law and fact. [illegible] the rule [illegible] the master, at which hearing witnesses testified for complainant, and respondents, Chauffeurs, Aides and Campbell testified in their own defense and that of the Union. Neither respondents, Thomas [illegible], also testified. On December 18, 1924, the master, after overruling objections to his report by certain respondents, and by consolidating the petitions thereof, filed his report. In brief, after making findings, he recommended that the respondents, the [illegible] and Thomas Healy, be discharged, and that a [illegible] be entered against the said respondents, Union, Chauffeurs, Aides and Campbell, finding each guilty of willful violations of said injunction in the particulars set forth in the report, and further recommended that [illegible] punished by the court. It is [illegible] that the [illegible] had no exceptions before the court [illegible] on January 5, 1925, the court or counsel appointed from [illegible], in their [illegible] all exceptions, approved the master's report and made such findings

of fact substantially in accordance therewith. We have reviewed these findings, as well as the court's conclusions, and are of the opinion that they are sustained by a clear preponderance of the evidence as to each and all of the respondents, who were officers or agents of said Bricklayers' Union, Shaughnessy being its President, Wilde its assistant financial secretary, and Stretch and Campbell two of its business agents.

Counsel for the several appellants urge numerous legal points as grounds for a reversal of the order. It is first contended that the court was without jurisdiction to refer the questions, whether each of said respondents wilfully violated said injunction and was guilty of contempt of court, to a master in chancery for his findings and conclusions, but that those questions should have been tried before a jury. We see no merit in the contention. This is clearly a case of civil contempt, as distinguished from criminal contempt. (People v. Diedrich, 141 Ill. 663, 669; Swedish-American Telephone Co. v. Fidelity & Casualty Co., 230 Id. 562, 572); and in such cases the practice and procedure as in chancery is proper and controlling. (Hake v. People, 230 Ill. 174, 192.) The court, as a chancery court, was vested with full power to punish wilful violators of its orders. (Schmidt v. Cooper, 274 Ill. 243, 250; People v. Seymour, 272 Id. 295, 301.) In the Schmidt case it is said: "The power to punish for contempt is inherent in every court of justice, and necessarily includes all acts calculated to impede, embarrass or obstruct the court in the due administration of justice, and the power is independent of statutory provisions." And the respective punishments inflicted were not unusual or improper. (Hake v. People, 230 Ill. 174, 194; Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, 203.) And in such proceedings as the present it has frequently been decided that respondents are not entitled to a trial of the charges made against them by a jury. (O'Brien v. People, 216 Ill. 354, 370; People v. Kowalski, 307

[illegible]

Id. 378, 385; In re Debs, 158 U. S. 564, 594.)

And we think that counsels' further point, viz, that appellants' guilt of the charges of violating the injunction must be proven beyond a reasonable doubt, is equally without merit. A preponderance of the evidence is all that is required in this State in the case of a civil contempt. (People v. Buconich, 277 Ill. 290, 294; Flannery v. People, 225 Id. 62, 69.) We do not understand that the decision of the Supreme Court of the United States in Michaelson v. United States, 266 U. S. 42, cited by counsel, is decisive of counsels' point in the case of a civil contempt. There the Court had under consideration the effect of certain provisions of the Clayton Act of October 15, 1914, requiring a jury trial upon demand in certain specified kinds of contempt (p. 62); and decided that the Act, reasonably construed, related exclusively to criminal contempts (p. 65); and further decided, following the holdings in Gompers v. Bucks Stove & Range Co., 221 U. S. 418, that in criminal contempts, as in criminal cases, proof of guilt must be beyond a reasonable doubt. Furthermore, in this connection, attention is called to the decision of the Supreme Court of this State, in Rothschild & Co. v. Steger Piano Co., 256 Ill. 196, where, after discussing the Gompers case, it is said (p. 205): "The difference between the established practice in this State andthe rule laid down by the United States Supreme Court in the Gompers case is apparent."

And, under the issues as framed and the evidence, we fail to see the applicability of counsels' further point that complainant cannot be heard to complain of any rules adopted by the Union for the government of the conduct of its own members, or to invoke the aid of a court of equity to restrain the enforcements of such rules.

Counsel finally contend that, under the Act of the Legislature, entitled "An Act relating to disputes concerning terms and conditions of employment," approved June 19, 1925, and in force

Id. 375, 385; In re Debs, 158 U. S. 564, 594.)

And we think that commerce, further note, viz., the expeditious, swift of the charges of violating the injunction must be proven beyond a reasonable doubt. In criminal matters, A preponderance of the evidence is all that is required in this state in the case of a civil contempt. (Ziegler v. Ziegler, 277 Ill. 290, 294; Flannery v. Keenan, 2 N Id. 52, 60.) We do not understand that the decisions of the supreme court of the United States in Michaelson v. United States, 266 U. S. 42, cited by counsel, is decisive of counsel's point in the case of a civil contempt. There the Court had under consideration the effect of certain provisions of the Clayton Act of October 15, 1914, requiring a jury trial upon demand in certain specified kinds of contempt (p. 65); and decided that the act, reasonably construed, related exclusively to criminal contempts (p. 65); and further construed, following the holdings in Gompers v. Bucks Stove & Range Co., 221 U. S. 418, that in criminal contempts, as in criminal cases, proof of guilt must be beyond a reasonable doubt. Nevertheless, in this connection, attention is called to the decision of the supreme court of this State, in Rutkowski v. Rutkowski, 298 Ill. 124, where, after discussing the Gompers case, it is said (p. 127): "The difference between the constitutional provision in this State and that in the United States by the United States supreme court in the Gompers case is apparent."

And, upon the issues of fraud and the evidence, we fail to see the applicability of counsel's further point that contempt cannot be based on violation of any order entered by the Union for the government of the conduct of its own members, or to force the aid of a court of equity to restrain the unfavorable of such rules.

Counsel finally contend that, under the decisions of the Illinois, entitled "An act relating to disputes concerning wages and conditions of employment," approved June 15, 1903, in force

July 1, 1925, (Cahill's Stat. 1925, page 421, Chap. 22, Sec. 58), the issuance of such an injunction as was issued in the present case is prohibited, and that the passage of such Act "in effect repeals and abrogates the practice and procedure in relation to such injunctions." It is a sufficient answer to the contention, we think, to say that the writ of injunction had been issued, the petitions filed, and the order appealed from entered, all before the passage of the Act. The court clearly had power and jurisdiction to issue the injunction, and, even if erroneously entered, it was not void, and the respondents were bound to obey it until set aside or modified on appeal or on writ of error. (American Cigar Co. v. Berger, 221 Ill. App. 285, 290; Franklin Union v. People, 220 Ill. 355, 367; Lyon & Healy v. Piano Workers' Union, 289 Id. 176, 181.)

For the reasons indicated the order of the Superior court of January 17, 1925, is affirmed as to respondent, Peter S. Shaughnessy, as well as to the other respondents.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

July 1, 1922, (Cahill's Stat. 1922, page 201, Chap. 27, sec. 32), the issuance of such an injunction as was issued in the present case is prohibited, and that the passage of such law "in effect repeals and abrogates the practice and procedure in relation to such injunctions." It is a sufficient answer to the contention, we think, to say that the writ of injunction had been issued, the petitions filed, and the order appealed from entered, all before the passage of the act. The court clearly had power and jurisdiction to issue the injunction, and, even if erroneously entered, it was not void, and the respondents were bound to obey it until set aside or modified or reversed on writ of error. (American Sugar Co. v. Bender, 273 Ill. 390, 396, 399; Franklin Union v. People, 220 Ill. 355, 367; Lunn v. Shelby v. Piano Workers' Union, 287 Ill. 176, 181.)

For the reasons indicated the order of the superior court of January 17, 1922, is affirmed as to respondent, Victor E. Shumpnerey, as well as to the other respondents.

Affirmed.

Barnes, P. J., and Pitch, J., concur.

5037

16 - 29580

IDA G. HOGG et al.,
Complainants and Appellees,

v.

JULIA CUMMINGS HOHMANN et al.,
Defendants.

On appeal of THEODORE P. KELLER,
Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

240 I.A. 667

PER CURIAM.

This appeal by Theodore P. Keller, one of the defendants to this suit, merely presents the question whether the transfer of certain stock of the Anaconda Copper Mining Company in his name, which he admits was done for the use and benefit of defendant Julia Cummings Hohmann, was properly decreed to be fraudulent and void in the decree appealed from. We passed on that question and so held on a review of the decree in the above entitled case on a writ of error sued out by said Julia Cummings Hohmann in case No. 29549, bearing the same title as above, the opinion in which has been filed this day. It is sufficient to refer to that opinion for the facts of the case and for our reasons in holding that the decree so far as it affects appellant should be affirmed.

AFFIRMED.

No. - 22210

ZIRA G. BORE et al., Complainants and Appellees,	
v.	
JULIA CHANDLER HOLMES et al., Defendants,	
On appeal at INDIANA P. [illegible], Appellant.	

Cook County.

FOR COURT.

Mr. Justice [illegible] delivered the opinion of the court.

This appeal by Theodore G. Kelley, one of the defendants in this suit, merely raises the question whether the transfer of certain stock of the Amazonia Copper Mining Company in his name, which he admits was done for the sole benefit of Julia Chandler Holmes, was properly decreed to be fraudulent and void in the decree appealed from. We passed on it [illegible] on a writ of error [illegible] by said Julia Chandler Holmes in [illegible]. Besides, as noted [illegible] as above, the question in which [illegible] is sufficient to refer to our opinion for the facts of the case and for our reasons in holding that the decree [illegible] effects appellant should be affirmed.

AFFIRMED.

27 - 30260

UNION CONTRACTING CO.,
a corporation,
Complainant,

v.

WASHINGTON CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt
proceedings against CHARLES L. WILDE,
Respondent and Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

240 I.A. 667

PER CURIAM.

For the reasons stated in the opinion, this day filed, in case No. 30259, the order of the Superior court of Cook county, entered January 17, 1925, as to respondent Charles L. Wilde, is affirmed.

AFFIRMED.

No. 30280

UNION CONTRACTING CO.,
a corporation,
Cross-plaintiff,

v.

WASHINGTON CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt proceedings against CHARLES L. SLADE, respondent and appellant.

FOR CRIMINAL.

For the reasons stated in the opinion, this day filed, in case No. 30280, the order of the Superior Court of Cook County, entered January 17, 1929, as to respondent Charles L. Slade, is affirmed.

AFFIRMED.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

28 - 30261

UNION CONTRACTING CO.,
a corporation,
Complainant,

v.

WASHINGTON CONSTRUCTION CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt
proceedings against JOHN CAMPBELL,
Respondent and Appellant.

APPEAL FROM

SUPERIOR COURT

OF COOK COUNTY.

240 I.A. 667

PER CURIAM.

For the reasons stated in the opinion this day filed, in case No. 30859, the order of the Superior court of Cook County, entered January 17, 1925, as to respondent John Campbell, is affirmed.

AFFIRMED.

29 - 30262

UNION CONTRACTING CO., a corporation, Complainant, v. WASHINGTON CONSTRUCTION CO., a corporation, et al., Defendants.	Appeal from Superior Court of Cook County.
In the matter of the contempt proceedings against JOHN T. STRETCH, Respondent and Appellant.	240 I.A. 667

PER CURIAM.

For the reasons stated in the opinion this day filed, in case No. 30259, the order of the Superior court of Cook county, entered January 17, 1925, as to respondent John J. Stretch, is affirmed.

AFFIRMED.

29 - 30262

UNION CONTRACTING CO.,
a corporation,
Complainant,

v.

WASHINGTON CONTRACTING CO.,
a corporation, et al.,
Defendants.

In the matter of the contempt
proceedings against J. T. STANTON,
Respondent and Appellant.

Appeal from

Superior Court

of Cook County.

24014. 587

FOR ABSTRACT.

For the reasons stated in the opinion this day filed,

in case No. 30262, the order of the superior court of Cook

county, entered January 17, 1902, in the proceedings herein,

STANTON, is affirmed.

AFFIRMED.

30314

5 C 1

35 - 30314

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

DAVE OSTRAN,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 668

PER CURIAM.

This case was consolidated for hearing with case No. 30313, People v. Joseph Clancy, in which we have this day filed an opinion affirming the judgment holding him in contempt of court and imposing punishment therefor. Both cases were heard at the same time and upon the same evidence, and for the reasons stated in the Clancy case the judgment in the case at bar will be affirmed.

239 Ill. App.

AFFIRMED.

66 - 30315

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

EDWARD DECKERT,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

240 I.A. 668

PER CURIAM.

This case was consolidated for hearing with case No. 30313, People v. Joseph Clancy, in which we have this day filed an opinion affirming the judgment holding him in contempt of court and imposing punishment therefor. Both cases were heard at the same time and upon the same evidence, and for the reasons stated in the Clancy case the judgment in the case at bar will be affirmed.

AFFIRMED.

See 15 68 for brief

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

EDWARD DUGGERT,
Plaintiff in Error.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

24014.668

MR. JUSTICE

This case was consolidated for hearing with case No. 30314, People v. Joseph Glenn, in which we have this day filed an opinion affirming the judgment holding him in contempt of court and imposing punishment therefor. Both cases were heard at the same time and upon the same evidence, and for the reasons stated in the Glenn case the judgment in the case at bar will be affirmed.

AFFIRMED.

101 - 30359

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	
JOSEPH SOLTIS, Plaintiff in Error.	

240 I.A. 668

PER CURIAM.

This case involves the same course of procedure and rulings as those in case No. 30358, People v. Joseph Soltis, reversed in an opinion filed therein of this date. For the reasons therein stated the judgment under review must be reversed and remanded.

REVERSED AND REMANDED.

101 - 80389

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
v.	
JOSEPH SOLTIS, Plaintiff in Error.	

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 668

MR. JUSTICE.

This case involves the same question of proceeding and findings as those in case No. 80388, People v. Joseph Soltis. Reference is to opinion filed therein of this date. For the reasons therein stated the judgment herein must be reversed and remanded.

REVERSED AND REMANDED.

105 - 30363

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

STEVE SCHULTZ,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 668

PER CURIAM.

This case involves the same course of procedure and rulings as those in case No. 30358, People v. Joseph Soltis, reversed in an opinion filed therein of this date. For the reasons therein stated the judgment under review must be reversed and remanded.

REVERSED AND REMANDED.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in error,

v.

STEVE SCHULT,
Plaintiff in error.

PER CURIAM.

This case involves the same course of procedure and rulings as those in case No. 40658, People v. Joseph Collins, reversed in an opinion filed therein of this date. For the reasons therein stated the judgment under review is reversed and remanded.

Reversed and remanded.

108 - 30364

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

JOHN SOLTIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 669

PER CURIAM.

This case involves the same course of procedure and rulings as those in case No. 30338, People v. Joseph Soltis, reversed in an opinion filed therein of this date. For the reasons therein stated the judgment under review must be reversed and remanded.

REVERSED AND REMANDED.

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	
v.	ERROR TO
JOHN SOLTIS, Plaintiff in Error.	MUNICIPAL COURT OF CHICAGO.

MR. PRESIDENT.

This case involves the same issues of procedure and evidence as those in suit in No. [illegible], People v. Joseph Soltis, reversed in an opinion filed herein at this term. For the reasons therein stated the judgment under review herein must be reversed and remanded.

REVERSED AND REMANDED.

6 - 29931

HERMAN TURNER, Defendant in Error, v. CARRIE SHINABLE, Plaintiff in Error.	ERROR TO SUPERIOR COURT, COOK COUNTY.

240 I.A. 669

Opinion filed Wed. Feb. 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant, Carrie Shinable, seeks to reversed a judgment recovered against her by the plaintiff, Herman Turner, in the Superior Court of Cook County. The plaintiff filed a declaration consisting of one special count and the common counts. It will not be necessary to set forth here the particulars alleged in the special count. The ad damnum laid in the declaration was $600. Appended to the declaration was the plaintiff's affidavit of the amount claimed to be due, in which he set forth that his demand was "for money due the plaintiff from the defendant for wages as a laborer and servant, and for board as set forth in the foregoing declaration, in addition to reasonable attorney's fees, and that there is due to the plaintiff from the defendant, after allowing to the defendant all just credits, deductions and set-offs, Three Hundred and Fifty Dollars." The defendant was duly served but did not appear and was

defaulted. The plaintiff presented his proof and his damages were assessed by the court.

It is the defendant's contention in support of her appeal that the plaintiff was limited in his recovery to the amount stated by him in his affidavit of claim, and that being $350, the judgment which he recovered for $450, cannot be permitted to stand. In support of this proposition the defendant has called our attention to Ridding v. Looney, 208 Ill. App. 413, where the court said the "plaintiff can prove and recover only what is stated in his affidavit of claim, but he cannot prove and recover even that unless he has an appropriate declaration on that cause of action." The question involved in that case was one affecting the sufficiency of an affidavit of merits which had been filed by the defendant, and in passing upon that question the court used the sentence quoted in commenting on a proposition that the rule limiting the defendant to the defenses set forth in the affidavit of merits would not result "in trying cases on issues formed by an affidavit of claim and an affidavit of merits." The only purpose of the affidavit is to entitle a plaintiff to judgment, as in case of default, unless the defendant shall file an affidavit of merits with his pleadings, and in case of such default the plaintiff's affidavit may be taken as prima facie evidence of the amount due, or the court may require further proof. Kern v. Strasberger, 71 Ill. 303.

In our opinion the defendant is not in a position to contend in this court that the plaintiff was limited in

contract. The [illegible] provisions [illegible] damages are measured by its terms.

In is the defendant's contention in support of her appeal that the plaintiff was limited in his recovery to the amount stated by him in his affidavit of claim, and that being $200, the judgment which he recovered for $600, cannot be restricted to stand. In support of this proposition the defendant has called our attention to Riddle v. Lumber, 200 Ill. App. 412, where the court held the "plaintiff can prove and recover only what is stated in his affidavit of claim, and he cannot prove and recover even that unless he has an appropriate description on that issue of action." The question involved in that case was one affecting the sufficiency of an affidavit of merits which had been filed by the defendant, so, in passing upon that question the court said the evidence offered in connection on a foreclosure where the note limiting the defendant to the defenses set forth in the affidavit of merits would not result the original action on issues tried by an affidavit of claim [illegible] of merits." The only purpose of the affidavit is to [illegible] [illegible] if judgment, as in case of default, follows for [illegible] and not to file an affidavit of action with the pleadings, and in case of [illegible] the plaintiff's affidavit may be taken as prima facie evidence of [illegible] day, or the court may require further proof. Lane v. [illegible], [illegible]

In our opinion the [illegible] in [illegible] to contend in this court [illegible] in

the amount of his recovery, to the amount set forth by him in his affidavit of claim. The record shows that the court entered judgment as heretofore indicated "after hearing all the allegations and proofs submitted herein by the plaintiff," but the record contains no bill of exceptions. We are obliged, therefore, to assume that the proofs which the court heard were sufficient to support the judgment. If those proofs warranted the assessment of the plaintiff's damages, at an amount in excess of that set forth in the affidavit of claim, the plaintiff would have had the right to amend his affidavit, if objection had been interposed and the point of variance raised. Even if we assume, as the defendant contends, that the plaintiff was limited by his affidavit of claim, as this court did in Pass v. Briggs & Turivas, 231 Ill. App. 214, the judgment recovered by the plaintiff may not be disturbed, for the reason above set forth.

The amount of the judgment entered in the trial court was within the ad damnum laid down in the declaration, as was the case in Keator Lumber Company v. Thompson, 144 U.S. 434, where a similar contention was made and where, as in the case at bar, the evidence was not preserved by a bill of exceptions, and it was not shown that the defendant had made any objection to evidence showing an indebtedness on its part in excess of the sum claimed in the plaintiff's affidavit. In that case, the United States Supreme Court said, "No point was directly made in the court below, either before or after judgment, that the plaintiffs were limited in their

the amount of his recovery, to the amount set forth in his affidavit of claim. The record shows that the court granted judgment as hereinbefore indicated after hearing all the allegations and proofs submitted respectively by the plaintiff, but the record contains no bill of exceptions. We are obliged, therefore, to assume that the proofs which the court heard were sufficient to support the judgment. If those proofs warranted the assessment of the plaintiff's damages, at an amount in excess of that set forth in his affidavit of claim, the plaintiff could have had the right to amend his affidavit, if objection had been interposed and the point of variance raised. Even if we assume, on the informal contention, that the plaintiff was limited by his affidavit of claim, as this court did in Pano v. Del Sole & Fratello, 221 Ill. App. 514, the judgment rendered by the plaintiff may not be disturbed, for the proofs clearly set forth.

The record of the judgment entered in the trial court was within the ad damnum [illegible] in the declaration, as was the case in Equity Lumber Company v. Fleischer, 249 Ill. 424, where a similar contention was made. In the case at bar, the evidence was not preserved by a bill of exceptions, and if we can assume that the [illegible] and only objection to the [illegible] in the plaintiff's affidavit of claim, in the [illegible] in the plaintiff's affidavit. In that case, the Mr. Justice Duncan said, "In point of a directly made in the [illegible], either before or after judgment, that the plaintiffs were limited in their

recovery, to the sum of money in their affidavit. An objection of that character, made for the first time in this court, ought not to be entertained."

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

30258

35 - 30258

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO MUNICIPAL COURT OF CHICAGO.
v.	
NICK PAPPAS, Plaintiff in Error.	240 I.A. 669

Opinion filed Feb. 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the defendant Pappas seeks to reverse a judgment of the Municipal Court of Chicago, by which he was found guilty of an assault with a deadly weapon, and fined $50.00 and costs, and sentenced to the House of Correction of Cook County for the term of three months. The only point urged in support of the writ of error is that the information filed is insufficient to support the judgment, in that it was not signed or verified by the affidavit of the person presenting it.

Section 27 of the Municipal Court Act, (Cahill's Ill. Sts. Chap. 37, par. 415) provides that all criminal cases in the Municipal Court, in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, may be prosecuted by information of the attorney general or state's attorney or some other person, and when the information is presented by any person other than the attorney general or state's attorney, "it shall be verified by affidavit of such person."

[illegible]

Motion to be dismissed.

v.

[illegible]

Motion denied.

[illegible]

Opinion filed Feb. 5, 1926.

[illegible]

opinion of the court.

By this writ of error [illegible] to reverse a judgment of the [illegible] by which he was found guilty of an assault with a deadly weapon, and fined $[illegible] and costs, and sentenced to the House of Correction of Cook County for [illegible] months. The only point urged in support of the writ of error is that the information filed by [illegible] judgment, in that it [illegible] by the filing of the motion presented.

Section 27 of the [illegible] Act, [illegible] Ill. Rev. Stat. 1923, par. 426) provides [illegible] cause in the [illegible] by line or amendment, [illegible] may be possessed of information or evidence [illegible] or omitted act, or [illegible] tion is supported by [illegible] general or special statute, it shall be [illegible] affidavit of such reason."

The information filed in the case at bar recites upon its face that "Wloyd Davis * * * In his own proper person comes now here into court and in the name and by the authority of the People of the State of Illinois, gives the Court to be informed and understand, and states the facts to be that" the defendant, Nick Pappas, had made the assault complained of, "in and upon one Wloyd Davis, with intent then and there to inflict upon the person of said Wloyd Davis a bodily injury, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the State of Illinois." The information purports to be signed by "A. S. Amundsen." This information is verified by an affidavit reading as follows: "A. S. Amundsen being duly sworn, on oath, deposes and says that he resides at Chgo. Ill. that he has read the foregoing information by him subscribed and knows the contents thereof and that said information and the matters and things therein stated are true." This affidavit was signed, "A. S. Amundsen."

The writ of error is before us on the common law record and that record recites as follows: "Now comes A. S. Amundsen and in the name of the people of the State of Illinois presents to the court the information herein under oath, and moves the court that leave be granted to file said information, and the presiding Judge of this Court, having examined said information, and having examined under oath the person presenting the same, and having heard evidence thereon, and being satisfied that there is probable cause for filing the same, and said Judge, having so endorsed the same, and the Court being fully advised in the premises, it is ordered

The information filed in the case at bar tendies upon its face that "Floyd Davis" [illegible] one [illegible] person could not have been both sworn and in the case and by the authority of the People of the State of Illinois, given the Court to be informed and understand, the matters [illegible] facts to be that" the said [illegible], did charge, had made the assault complained of, "in and upon one Floyd Davis, with intent then and there to inflict upon the person of said Floyd Davis a bodily injury, contrary to the statute in such case made and provided, and against the peace and dignity of the people of the state of Illinois." The information purports to be signed by "A. B. Assumsen." This information is verified by an affidavit reading as follows: "A. B. Assumsen being duly sworn, on oath, deposes and says that he resides at Cgo. Ill. that he has read the foregoing information by him subscribed and knows the contents thereof and that said information and the matters and things therein stated are true." This affidavit was signed, "A. B. Assumsen."

The writ of error is before us on the common law record and that record recites as follows: "[illegible] A. B. Assumsen and in the name of the People of the State of Illinois presents to the court the information herein under oath, and moves the court that leave be granted to file said information, and the presiding judge of this court, having examined said information, and having examined under oath the person presenting the same, and having heard evidence [illegible], and being satisfied that there is probable cause for filing the same, and said judge, having [illegible] [illegible], and the court being fully advised in the premises, [illegible] granted

that leave be and hereby is granted to file said information instanter." While that information is not accurate, in our opinion, it is sufficient to support the judgment. The information is signed by Amundsen, and he makes affidavit in proper form to the effect that he has read it and knows its contents and that the information and the matters therein stated are true. That being the situation, Amundsen could have been held for perjury if it were proven that the information was false. The only question is whether or not the information was verified by the affifavit of the person presenting it, as the statute above quoted requires. The information complained of an assault upon one Davis, and on its face the information recites that Davis has come into court and given the court to be informed as therein stated. But the order entered by the court as it appears in the record recites that Amundsen was the one who presented the information to the court and made a motion for leave to file it. It seems clear, in our opinion, that the information and the order of the court, should be read and construed together and that inasmuch as the assault complained of was upon Davis, which required that the name of Davis appear in several places in the information blank, the writing of that name in the first line of that document was a clerical error. In our opinion the situation thus presented in the case at bar is not at all similar to that which was before the court in The People v. Blum, 172 Ill. App. 493, where the information on its face purported to be made by Bertha Blum, complaining of abandonment by her husband, Nathan Blum, but instead of being signed by her it purported to be signed by him, and where

that leave be and hereby is granted to file said informa-
tion instanter.* Where that information is not courtesy,
in our opinion, it is sufficient to set out the judgment.
The information is signed by Samuelson, and he makes affi-
davit in proper form to the effect that he has read it
and knows its contents and that the information and the
matters therein stated are true. That being the situa-
tion, Samuelson could have been held for perjury if it were
proven that the information was false. The only question
is whether or not the information was verified by the affi-
davit of the person presented, if, as our statute above
quoted requires. The information complained of as consult
upon one Davis, and on its face the information recites
that Davis has come into court and given the court to be
informed as therein stated. But the other mistake by the
court as it appears in the record recites that Samuelson was
the one who presented the information to the court and made
a motion for leave to file it. It seems clear, in our
opinion, that the information was not at the court,
should be read and construed together and that Samuelson as
the consult complained of was not Davis, which required
that the act of Davis appear in several places in the in-
formation blank. The failing of such case in the first line
of that document was a clerical error. In our judgment the
situation thus presented in the case at bar is not at all
similar to that which was held in the court in The People v.
Hyde, 172 Ill. App. 492, where the information on its face
purported to be made by Martin Hyde, commencing as follows:
"Comes by her husband, Martin Hyde, her trustee" or being
signed by her it purported to be signed by Hyde, and there

the verification of the information consisted of an affidavit reciting that Bertha Blum, being duly sworn, deposed and said that she had read the information by her subscribed and knew the contents thereof, and that the information and the matters therein alleged were true; and it also was signed by Nathan Blum. There, it will be seen, both the information and the verification were executed, not by the person presenting the information, but by the accused. Another case somewhat similar to the one just referred to was presented to this court in People v. Johnson, 228 Ill. App. 641, where the charge in the information purported to be made and presented by one Eric Hernicy, and the verification recited that it was made by Eric Hernicy, but the information and verification both were signed by one Alex Helmecz. In that case we pointed out that, as it stood, the information was neither made by the person swearing to it, nor sworn to by the person making it, and that if false, perjury could not be predicated upon it, as to either of the parties whose names appeared upon it. That is not the situation presented in the case at bar. Here the information was verified by the affidavit of the person who signed the information, and the record recites that the person presenting the information to the court was the same one who had signed it and verified it. Although the information is to the effect that the injured party was the one presenting it, we are of the opinion that should not vitiate the judgment, as it would seem to be clear that the one making out the information committed a

the verification of the information consisted of an affidavit reciting that merely from, being duly sworn, deposed and said that she be read the information by her subscribed and gave the accusing oversel, and that the information and the there statements were true; and it also was signed by Justice Jones. There, it will be seen, both the information and the verification were executed, not by the person preferring the information, but by the assured. Another case somewhat similar to the one just mentioned is reported in 3 [illegible] in Jordin v. Johnson, 3 K. [illegible], 661, 3 [illegible] the information purporting to be a executed one Eric Hewlay, but the verification that it was made by Pius Gerity, but the information and verification both were signed by the Alex Johnson. [illegible] points out that, as it stand, the information and verification made by the person preferring is, in to be by the person making it, and that if it [illegible] not be predicated upon it, as to [illegible] appeared upon it. [illegible] the case at bar, [illegible] [illegible] [illegible] reason [illegible] to the court was [illegible] it. Although the information [illegible] [illegible] [illegible] the [illegible] [illegible]

clerical error and that the recitation of the court order as it appears in the record is correct.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

54 - 30302

LEOPOLD COHEN IRON COMPANY,
a corp.,

Plaintiff in Error,

v.

PRICE IRON & STEEL CO.,
a corp.,

Defendant in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 669

Opinion filed Feb. 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this writ of error the plaintiff Leopold Cohen Iron Company seeks to reverse a judgment based upon the finding of the trial court, without a jury, that the plaintiff take nothing by its suit, by which judgment said suit of the plaintiff was dismissed with costs against the plaintiff. The action of the plaintiff was based upon a contract under which it agreed to sell and the defendant Price Iron & Steel Co. agreed to buy 1,000 gross tons of re-rolling steel rails at $23.75 per ton, 500 tons to be delivered to the Calumet Steel Company and 500 tons to the Inland Steel Company, both the latter companies being located at Chicago Heights, Illinois. Under this contract all of the rails except a little over 600,000 pounds were delivered, accepted and paid for. It is the balance which is in controversy between the parties, the plaintiff claiming damages for the alleged breach of the contract by the defendant, in failing to take the balance of the rails. It appears from the evidence in the record that the plain-

IRONWOOD IRON COMPANY,
a corp.,

[illegible]

v.

PRICE IRON & [illegible] CO.,
a corp.,

[illegible]

Opinion filed Feb. 5, 1926.

[illegible] opinion of the court.

[illegible]

tiff was purchasing the steel with which it was meeting the requirements of this contract, from the Chicago & Northwestern Railway Company. It appears further from the evidence in the record that the balance of the steel required for the fulfillment of this contract by the plaintiff was loaded by the Chicago & Northwestern Railway Company on orders received by it from the plaintiff on June 9, 1923. Bills of lading were made out by the Railway Company covering this steel on the day it was loaded. Under the arrangement existing between the plaintiff and the Railway Company, according to the evidence in the record, the rails that went into the cars that were loaded on June 9, remained the property of the Railway Company until paid for and the plaintiff did not have the right to have the rails removed from the shops of the Railway Company and shipped until they were paid for. The bills of lading made out on this shipment remained in the possession of the Chicago & Northwestern Railway Company until the material was paid for and the evidence shows that payment for the rails in question was made by the plaintiff to the Railway Company on June 12.

The contract between the parties to this case contained a paragraph reading as follows: "TIME OF DELIVERY. Shipments to start at once and to be distributed during the next fifty (50) days. -- You have the privilege of shipping sooner if possible."

The plaintiff proved the execution of the contract and the deliveries which had been made under it. It introduced a letter sent by the defendant to the plaintiff under

date of June 9, 1923, in which the defendant requested the plaintiff to refer to the contract in question (called an order in the latter) "which order expired on June 8. Kindly be advised that we are cancelling the remaining unshipped portion. Please adjust your records accordingly." Plaintiff also introduced a letter received from the defendant, which letter was dated June 11, and acknowledged invoices covering the shipment in question, "On order #30981, which order expired and was cancelled on June 8. This is to advise you that we will not accept these cars unless you have positive proof with bills of lading showing they were shipped prior to the 8th of this month." The plaintiff introduced further, another letter signed by the defendant dated June 11, referring to the same contract order which "expired on June 9th and we will accept no further shipments against same." Other evidence introduced by the plaintiff, as to what was done by the Chicago & Northwestern Railway Company, in the way of loading several cars of rails on June 9, under orders from the plaintiff, consigned to the Inland Steel Company, Chicago Heights, has previously been referred to. The president of the plaintiff company testified that the plaintiff paid the Northwestern Railway Company for these rails on June 12, and he got the bills of lading on the shipments on the same day. At the close of the plaintiff's evidence the court allowed a motion by the defendant for a finding in its favor, and the judgment hereinabove referred to was then entered.

In our opinion the contention of the defendant to the effect that the plaintiff failed to make out a prima

date of June 8, 1883, in which [illegible] requested the plaintiff to refer to the contract in question (which was an order in the latter) "such order stating [illegible] 6, kindly be advised that we are expecting and requiring warehouse receipts. Please adjust [illegible] accordingly." Plaintiff also introduces a letter received from the defendant, which letter was dated June 11, and acknowledged invoices covering the shipment in question, "On account 2500 bbls, which order entered [illegible] cancelled on June 8. This is to advise you that we will not accept these cars unless you have positive proof [illegible] showing where they were shipped prior to the 8th of June [illegible]." The plaintiff introduced further [illegible] letter signed by the defendants dated June 11, referring to the same contract order which "was red on June 9th and we will accept no further shipments against same." Other evidence introduced by the plaintiff, [illegible] way in the Chicago & Northwestern [illegible] Company, in the act of loading several cars of rails on June 8, under [illegible] from the plaintiff, consigned to the Illinois Steel Company, Chicago Heights, has [illegible] been referred to. The president of the plaintiff company [illegible] that the plaintiff paid [illegible] Northwestern Railway Company for these rails on June 12, and he got the bills of lading or the shipments on the same day. At the close of the plaintiff's evidence the court rightly [illegible] a motion [illegible] finding in its favor, [illegible] "[illegible] as was then entered.

In our opinion [illegible] to the effect that the plaintiff failed [illegible] the

facie case is correct, and that being the situation, the action of the trial court in dismissing the case, was proper. The defendant contends that under the terms of the contract the plaintiff was required to deliver the steel called for by the contract within fifty days from the date of the contract. That period of fifty days expired on June 9. The plaintiff contends on the other hand, that it was complying with the terms of the contract if it shipped all the steel called for within the contract period. Even if we adopt the view of the plaintiff, the evidence submitted in its behalf failed to make out a prima facie case. It is clear from the evidence to which we have already referred, that the plaintiff did not ship the cars of steel referred to in the testimony, on June 9. The fact that the cars were loaded and the bills of lading signed by the Chicago & Northwestern Railway Company, did not accomplish the shipment. The Railway Company was not acting merely as the carrier but as the owner of the steel rails which were being purchased from it by the plaintiff. Under the evidence referred to above, the plaintiff did not acquire title to these cars until June 12, and was not in a position to ship them to the defendant on this contract until that time, and the evidence shows that they did not leave the possession of the Railway Company until that day or after.

Apparently, in an effort to make out a prima facie case, the president of the plaintiff company testified that on June 9, 1923, the plaintiff had 500 tons or more of re-

[illegible] case is correct, and that being [illegible] situation, the [illegible] of the trial [illegible] in [illegible] the case, was proper. The defendant's [illegible] under the terms of the contract the plaintiff was entitled to delivery the steel called for by the contract within fifty days from the date of the contract. Such period of fifty days expired on June 8. The plaintiff contends on the other hand, that it was complying with the terms of the contract in that it is admitted it was ready called for its in the contract period. Even if we adopt the view of the plaintiff, the evidence submitted in its behalf failed to make out a prima facie case. It is clear from the evidence to which we have already referred, that the plaintiff did not give the date of steel delivered to in the testimony, on June 9. We find that the cars [illegible] loaded are [illegible] in having signed by the Chicago & Northwestern Railway Company. We not agree with the plaintiff. The Railway Company was not acting as its agent in the matter but as the agent of the owner with the [illegible] being responsible from it by the plaintiff. Under the evidence referred to above, the plaintiff [illegible] appears title to these cars until June 17, and we [illegible] in [illegible] tion to show that [illegible] contract until that time, and [illegible] the Railway Company [illegible] the notice from the Railway Company [illegible] after.

Generally, [illegible] tions [illegible] case, the primary [illegible] Plaintiff company [illegible] on June 8, 1907, the [illegible] had [illegible] new

rolling rails in their yards. In answering objections made by counsel for the defendant to this testimony, counsel for the plaintiff remarked that the plaintiff could have performed if the defendant had not stopped it. In our opinion, the testimony in the record does not bear out that statement. Under the terms of the contract it was incumbent upon the plaintiff, at least to ship if not to deliver, all the steel called for by the contract, consigned as specified in the contract, on or before June 9, 1923. The evidence fails to disclose anything, either done or said, by way of letter or otherwise, by the defendant which can reasonably be construed as having caused a failure on the part of the plaintiff to comply with the terms of the contract in this regard. The communication from the defendant to the plaintiff, purporting to cancel the balance of the steel called for by this contract, which had not been shipped, was dated June 9. The evidence does not show when the plaintiff received it. In the ordinary course of business it would have been on June 11, for the 10th was Sunday. The first communication referred to by the president of the plaintiff company, in the course of his testimony, is a letter which he says he received on June 11. That presumably, was the defendant's letter of June 9. The only other communications from the defendant to the plaintiff, in the record, are dated June 11. It thus appears that the first intimation coming to the plaintiff that the defendant was refusing to take further deliveries under the contract, on the ground that the time for performance had expired, was two days after the time

rolling mills in their yards. In answering interrogatories made by counsel for the defendants to this testimony, counsel for the plaintiff remarked that the plaintiff could have produced if the defendant had not admitted it. In our opinion, the testimony in the record does not bear out that statement. Under the terms of the contract it was incumbent upon the plaintiff, on first to show it not to deliver, all the steel called for by the contract, consisting of quantities in the contract, on or before June 1, 1921. The evidence fails to prove anything either done or made, by way of letter or other act, by the defendant which can reasonably be construed as having caused a failure on the part of the plaintiff to comply with the terms of the contract in question. The communication from [illegible] to the plaintiff, purporting to cancel the balance of the steel mentioned by this contract, which had not been [illegible] June 5. The evidence does not show when the plaintiff received it. [illegible] the testimony [illegible] it would have been on June 11, [illegible] June [illegible]. The first communication [illegible] of the plaintiff company, is the letter of [illegible], in a letter which [illegible] is given on June 11. That presumably, [illegible] June 9. The only other communication [illegible] to the plaintiff, is the letter, [illegible] June 14. We agree with the [illegible] that, in the [illegible] stipulation under the contract, [illegible] the defendants not exercise, [illegible]

for performance, under the contract, had expired. This is on the assumption that the plaintiff's interpretation of the contract is correct, to the effect that it did not call for complete delivery on or before June 9, but shipment on or before that date. No matter how much scrap steel of the kind called for by this contract may have been lying in the yards of the plaintiff, it had failed to comply with the terms of the contract if it had neglected to ship the steel within the contract period, and, as already stated, no showing was made to the effect that anything said or done either misled the plaintiff or caused it to postpone making the last shipments in fulfillment of the contract, until after the expiration of the period clearly specified by the terms of the contract.

Several matters are referred to by the parties in the briefs filed in this court, to which we do not refer in this opinion, because, in our opinion, the matters to which we have referred determine the issue presented, and because of these reasons, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

for performance, under the contract, had expired, this is on the assumption that the initial interpretation of the contract is correct, so far - that that it did not call for complete delivery on or before June 7, but shipment on or before that date. No matter how much scrap steel of the kind called for by this contract may have been lying in the yards of the plaintiff, it had failed to comply with the terms of the contract if it had neglected - only the steel during the contract period, and, as also by stated, no attempt was made to the effect that anything said to have either mislead the plaintiff or cause it to postpone making the last shipments in fulfillment of the contract, until after the expiration of the period allowed specified by the terms of the contract.

Several matters are relied to by the written in the briefs filed in this court, to which we do not refer in this opinion, because, in our judgment, the matters in which we have referred determine the case presented. The decree of the [illegible] of the Marion [illegible] is affirmed.

[illegible]

[illegible]

95 - 30352

FRANK GOLDBERG, Appellee, v. JOHN C. PHILPOTT, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 669

Opinion filed Feb. 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $69.00, recovered against him by the plaintiff in the Municipal Court of Chicago. The plaintiff was the owner of an automobile which was being driven by one Geneva Brown when it was damaged in a collision with a car owned and driven by the defendant at the intersection of 68th and State Streets in the City of Chicago. The plaintiff brought this action against the defendant to recover the cost of the repairs necessitated by this collision.

The plaintiff called the defendant as a witness under section 33 of the Municipal Court Act, and he testified that State Street is a north and south street, with a double track street car line upon it and 68th street is an east and west street without street car tracks. Vincennes avenue is a street running northeast and southwest, terminating at the west side of State Street, a little north of 68th street and running in a southwesterly direction from that

No. 30563

FRANK GOODWIN,

Appellee,

v.

JOHN C. PRINGLE,

Appellant.

Opinion filed Dec. 5, 1938.

Mr. PRESIDING JUSTICE TOMLINS delivered the opinion of the court:

By this appeal the defendant seeks to reverse a judgment for $850.00, recovered in an action tried by the circuit court of Cook County. The plaintiff was the owner of an automobile which was being driven by one Geneva Brown when it was involved in a collision with a car owned and driven by the defendant at the intersection of 67th and Lake Michigan Avenue, in Cook County, Illinois. The plaintiff brought this action against the defendant to recover the cost of the repairs necessitated by this collision.

The defendant denies the [illegible] negligence [illegible] section of [illegible] stated that [illegible] a reasonable [illegible] to meet and [illegible] avenue is a [illegible] 67th or the main [illegible] streets and running [illegible]

point, crossing 68th street about 50 feet west of the west line of State street. The triangle formed by these three streets on the north side of 68th street, contained no building or other structure to obstruct the view. The defendant testified when called as a witness by the plaintiff, that he was driving a Buick car east along the south side of 68th street; that he stopped at the west side of Vincennes avenue and then started up and proceeded east and again stopped at the west side of State street, where a southbound street car crossed his path; that he looked both ways and saw nothing else approaching, and he started up in first speed, and was just going across the northbound car track when he collided with the rear end of the plaintiff's car, which had come from the north, on the east side of State street; that there were no lights showing on the plaintiff's car and he did not see it approaching; that the accident happened about half past six in the evening on October 20, 1924; that "with the street car passing I couldn't see the car coming from the north. Anyway, I never looked for a car to come on the wrong side of the street;" that when he collided with the plaintiff's car he had passed the center of the intersection.

Geneva Brown, called as a witness by the plaintiff testified that she was driving the plaintiff's car, also a Buick, at the time of the collision; and that it was quite dark; that the lights on her car were lighted but that she thought the collision put them out; that she did not see the defendant's car approaching until she was about in the middle of 68th street and at that time the defendant was coming

point, crossing 68th street about 50 feet west of the west line of Lexington avenue. The testimony issued by these three witnesses as the north side of 68th street, none talked to building or other structure to continue the view. The defendant testified, as called as a witness by the plaintiff, that he was driving a Buick car east along the north side of 68th street; that he stopped at the west side of Lexington avenue and then started up and succeeded just and right stopped in the west side of Lexington avenue, when a southbound street car crashed into him; that he looked both ways and saw nothing close approaching, and he started in in first speed, and was just going across the southbound car track when he collided with the rear end of the plaintiff's car, which had come from the north, on the east side of Lexington avenue; that there were no lights showing on the plaintiff's car; that he did not see it approaching; that the conductor happened about half past six in the evening on October 20, 1924; that he in the street car passing I couldn't see the car coming in the north, anyway, I never looked for a car to come on the street at of the street car when he collided with the plaintiff's car he had passed the center of the intersection.

Mrs. Lorna Brown, called as a witness by the plaintiff testified that she was driving the plaintiff's car, that a Buick, at the time of the collision, was first in her right hand; the lights in her car were not lighted at that time; that the Buick was driven by the defendant; that the collision was not in the middle of 68th street, but at that time the defendant was

east on that street west of the west curb line of State street and was 18 or 20 feet away from her; and she swung to the east in an effort to avoid him. She said the defendant was going about 18 miles an hour and that she could not remember that there were any conveyances ahead of her. She also testified that as a result ofthe collision, the body of the plaintiff's car was dented, the fender was broken and the running board also. On cross-examination she testified that at the time of the collision she was going about 15 or 18 miles an hour, and that after the cars came together the defendant's car pushed the plaintiff's car about 5 feet. She stated that the pavement was of brick and that it was dry, and that at the speed she was going she could have stopped her car within its length, and that after the collision her car moved about 5 feet before it came to a stop. She also testified that she "thought it was kind of funny, after I was in the middle of the crossing and going across, that he wouldn't slow down," and she therefore blew her horn.

The defendant took the stand inhis own behalf and testified to the facts of the occurrence as he had already referred to them in his examination when called as a witness by the plaintiff. He also said he was not going over two of three miles an hour when the collision took place and that the plaintiff's car was being driven about 20 miles an hour. He stated that after the collision, his car moved 8 or 10 feet and the plaintiff's car about 15 feet before coming to a stop. He said he had his lights on but that the plaintiff's car did

[illegible] on such street [illegible] west [illegible] line of [illegible] street was 12 to 30 [illegible] feet; the one [illegible] to the east line of street [illegible]. He said the defendant was [illegible] 12 miles [illegible] and that he could not remember that there were any overhanging trees of his. [illegible] conditions [illegible] collision, the body of the plaintiff's car was dented, the fender was broken [illegible] the running board also. On cross-examination his testimony [illegible] of the collision was he was going about 12 or 12 miles [illegible] and that after the cars came together the left [illegible] the plaintiff's car about 3 feet. The [illegible] movement was of crude [illegible] the day, [illegible] one was a [illegible] the [illegible] fenders, and that after the collision [illegible] before it came to a stop. [illegible] "there's just a kind of lump, [illegible] the crossing [illegible] and the [illegible] more than [illegible].

The defendant [illegible] testimony [illegible] stated that the front of the [illegible] taken to [illegible] by the [illegible]. [illegible] there was [illegible] that the plaintiff's car was [illegible] stated that after the collision, the car moved 8 or 10 feet and the plaintiff's car moved [illegible] to a stop, [illegible] and to [illegible] 12 [illegible]

not. On cross-examination he stated again that he was going 2 or 3 miles an hour at the time of the accident. He was then asked this question, "After you hit her, you knocked her about 15 feet?" His answer was "10 or 15 feet."

A Mr. and Mrs. Cook were riding with the defendant at the time of the occurrence in question, sitting in the rear seat of his car. Mrs. Cook testified that a car was going south on State street and the defendant stopped his car at that point, and then started up in first speed. She was asked how many miles per hour he was going, and she answered, "Just three miles an hour." She also stated that after the accident the defendant's car went "five feet or so" before coming to a stop, and the other car went about 20 feet. She stated that the plaintiff's car had no lights on it but that the defendant's car did and that the plaintiff's car was going about 18 or 20 miles an hour, going south on the east side of State street. On cross-examination she stated that she didn't see the plaintiff's car at all before the collision. Mr. Cook testified substantially to the same effect.

In support of his appeal the defendant contends that inasmuch as he was approaching the intersection in question from the right of the driver of the plaintiff's car, he had the right of way, and that the evidence shows that Miss Brown, in failing to yield the right of way and proceeding over the intersection, although she did not have the right of way, was guilty of contributory negligence; and that the finding of the trial court, to the contrary, is against the manifest weight of the evidence.

not. The cross-examination is started again and is very lengthy. 2 or 3 miles on north at the line of the accident. He was then asked this question, "After you hit her, you carried her about 15 feet?" His answer was "15 or 15 feet."

A Mr. and Mrs. [illegible] riding with the defendant at the time of the occurrence in question, sitting in the rear seat of his car. Mr. [illegible] testified that he was going south on [illegible] and [illegible] at the car at that point, and then observed the first [illegible]. The car was about how many miles per [illegible] was going. He answered, "About [illegible] miles an hour." He [illegible] after the accident was definitely set [illegible] not before coming to a [illegible] the other car went about 50 feet. The witness then said [illegible] on it but that [illegible] and the [illegible] little or no [illegible] coming south on the east side of [illegible]. On cross-examination the witness was the plaintiff's [illegible] before the accident, [illegible] to the [illegible].

In support of [illegible] the defendant [illegible] testimony to show the right of the driver of the [illegible] car, [illegible] the right of way, [illegible] the evidence [illegible] in failing to yield the right of way [illegible] intersection, [illegible] was guilty of contributory negligence, [illegible] of the [illegible], or [illegible] weight of the evidence.

As we stated in the recent decision of Qwitz v. Chinbloom, and Sullivan case No. 30009, Illinois Appellate Court, First District, opinion filed, December 23, 1925, "We have had occasion to consider a number of cases concerning automobile collisions at street intersections, where the provision of the statute that a car approaching such an intersection from the right had the right of way over a car approaching it from the left, was involved. In applying that statute to the various situations involved in the different cases, we have endeavored to point out that this so-called law of the road must necessarily be applied to each case in the light of the circumstances involved." When we come to examine the circumstances presented in the case at bar, we find that under the facts as testified to by Miss Brown, this so-called law of the road is not applicable. She testified that she was half way across 68th street when the defendant was still west of the west line of State street; that the defendant was driving his car about 18 miles an hour and she was driving about 15 miles an hour. If that was the situation she was more than half way across the intersection when the defendant reached it. On the defendant's theory that he came to a stop at the west side of State street, it could not reasonably be said that in starting up to proceed across the street, he had the right of way over any and all motor traffic that might be approaching from the north on State street. Having stopped at the intersection it was his duty to see that the way was clear before he proceeded. The evidence in many respects is in sharp conflict; especially on the question of whether the

As we stated in our recent decision of Smith v. Hamilton, and Sullivan case on March 8, it has been held the Court, first instance, quality [illegible] 3, January 30, 1911, "We have had occasion to consider a number of cases dealing automobile collisions [illegible] where the problem of the evidence [illegible] much on interpretation [illegible] over a car approaching it from the [illegible], was involved. In applying this statute to the various situations involved in the different cases, we have endeavored to point out that this controlling law [illegible] be applied to each case in the light of the circumstances involved." When we come to examine the circumstances involved in the case at bar, we find that [illegible] as testified to by the [illegible], that [illegible] road is not straight. The testimony [illegible] way across [illegible] of the road line of [illegible] driving his car [illegible] about 12 miles an hour. If that [illegible] more than half way across the [illegible] and testing it. On the defendants theory [illegible] even as the car was [illegible] be merely just in starting on to [illegible] not the right of way [illegible] be responsible from the [illegible] to a intersection [illegible] clear Dodge on [illegible]. [illegible] in many conditions particularly in [illegible]

lights on the plaintiff's car were lighted, and whether plaintiff's car was being driven on the wrong side of the street. If, as Miss Brown testified, the defendant's car was west of the west curb of State street, and only twenty feet from her, she could not have been driving on the east side of the street until she swung over to avoid him. As to these points on which the witnesses differed, the trial court was in a much better position to pass on the credibility of the respective witnesses than we are. In our opinion, this court is not in a position to say that the finding of the trial court was against the manifest weight of the evidence.

The defendant contends further that the plaintiff failed to make proper proof as to his damages. On that question the plaintiff testified that he took his car to a garage for the purpose of having it repaired after this collision; that it was in good condition before the collision; that most of the repairs were made in his presence; that some time previous to this occurrence he had been employed in an automobile repair shop and that he had some knowledge of labor and services required in repairing automobiles; that as a result of this collision, a new fender was put on his car and a new running - board, and a dent in the body was pushed out, and several braces or staves installed to strengthen it; and also the rear wheels were properly lined up, all of which things were done under his direction. The plaintiff produced an itemized receipted bill of the garage, specifying these various matters, including the labor, the items of which aggregated $69.00, and he

lights on the plaintiff's car were lighted, and when a plaintiff's car was taken driven on the wrong side of the street. If, as she then testified, the defendant's car was most of the best part of thirty streets, and only seven feet from her, she could not have been driving on the most side of the street until she swung over to avoid him. As to these points on which the witnesses differed, the trial court was in a much better position to pass on the credibility of the respective witnesses than we can. In our opinion, this court is not in a position to say that the finding of the trial court was against the manifest weight of the evidence.

The defendant contends further that the plaintiff failed to make her proof as to the damages. In that question the evidence certainly could be that she was a passenger for the purpose of paying a particular store bill notwithstanding that it was an good question before the collision; that some of the injuries were such in his presence that some time elapsed before she could be sent or anyone else had been employed in an reasonable length ago and that he had some knowledge of labor and services required in repairing automobiles; that in a number of this condition, a new fender was put on the car and a new radiator - board, and a new in the body was painted out, and another, brought on during instalment of examination it; [illegible] the jury would have properly lined up, [illegible] the damages [illegible] direction. The evidence showed [illegible] the bill of the garage, specifying their various activity, including the labor, its place of [illegible] [illegible]

testified that he was at the garage the greater part of three days while these repairs were being installed, and that the work consumed about 17 or 18 hours. In our opinion, that proof was sufficient. Cloyes v. Flaatje, 231 Ill. App. 183.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

121 - 30379

MORRIS WULBERT,

Defendant in Error,

v.

HYMAN RUBIN,

Plaintiff in Error.

240 I.A. 670

ERROR TO

COUNTY COURT,

COOK COUNTY.

Opinion filed Feb. 3, 1926.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Wulbert, brought this action against the defendant, Rubin, seeking to recover a commission claimed to be due him on the sale of certain real estate owned by the defendant. The issues were submitted to a jury, resulting in a verdict for the plaintiff, which assessed his damages at the amount sued for, $795.00. Judgment was entered against the defendant for that amount, and he sued out this writ of error, contending that the judgment should be reversed because the verdict is against the manifest weight of the evidence; that the trial court erred in admitting certain testimony of the plaintiff, to which objection was made; and also in the giving of and refusing certain instructions.

In passing upon the first point urged by the defendant in support of his writ of error, it has become necessary to examine the evidence. The abstract filed by the defendant is attacked by counsel for the plaintiff in the brief filed by them, it being alleged that in com-

121 - 33279

MORRIS SUMNER,

Defendant in Error,

v.

RYZAN MORIX,

Plaintiff in Error.

ERROR TO
COURT OF
[illegible] COUNTY.

Opinion filed Feb. 3, 1888.

MR. PRESIDING JUSTICE [illegible] delivered the opinion of the court.

The plaintiff, Sumner, brought this action against the defendant, Morix, seeking to recover a conversion claimed to be due him on the sale of certain real estate owned by the defendants. The issues were submitted to a jury, resulting in a verdict for the plaintiff, which assessed his damages at [illegible] and [illegible]. Judgment was entered against the defendants for [illegible], and he sued out this writ of error, contending that the judgment should be reversed owing to the refusal of the trial court to grant a nonsuit, or to direct a verdict, upon the ground that there was no evidence in the record, to which objections were made, [illegible] in the giving of certain [illegible] instructions.

In passing upon the first point urged [illegible] statement in support of the motion, it [illegible] necessary to examine the evidence. The [illegible] by the defendant [illegible] in the brief filed [illegible], it seems [illegible]

paring the abstract with the record counsel have found that "there has beenconsistent elimination throughout the entire abstract." Counsel then proceed in their brief to give four or five illustrations of this condition of the abstract, about which they complain. They then say in their brief that they "realize that the proper method of meeting the situation is to prepare an additional abstract pointing out the defects. Were this case of sufficient consequence to justify this work and expenditure we would have been only too glad to prepare a complete new abstract. The amount involved, however, does not increase with continued litigation, but remains the same, while the expense incidental to continued litigation does increase. Under the circumstances we trust that the court in looking to any question of fact, will give such consideration to the abstract as prepared by plaintiff in error as the situation demands." What this amounts to is saying to this court that counsel do not consider their case of sufficient consequence to justify the work and expenditure necessary to the preparation of a proper abstract, although the one supplied by the defendant in error is alleged to have consistently left out important evidence throughout the record, and, therefore, we are asked to give it such consideration "as the situation deserves." We would remind counsel if the situation is as they contend, it deserves better treatment than they have given it. The work of a court of review is quite sufficient without having the duties of counsel added to it. The situation referred to has made it necessary for us to carefully examine all the testimony as it appears in the record.

parting the observer with the record counsel then found that "there has been[illegible] elimination throughout the entire district." Counsel then proceed in their brief to give four or five illustrations of the condition of the district, upon which they contend. They then say in their brief that they "believe that the proper method of meeting the situation is to engage an auditor[illegible] stmen pointing out the defects. Upon this main of sufficient counsel to justify this work [illegible] an auditor or would have been only too glad to prepare a statement[illegible] ment. The account involved, however, does not increase with constant lighting, but remains the same, while the expense involved in continued lighting does increase. Under the circumstances we hold that the work is incomplete to any question of fact, and, give such consideration to the contention as properly [illegible] in error on a [illegible] tion [illegible]." [illegible] to say, in the court that counsel do not contend or [illegible] consequence to justify the work of a [illegible] the preparation [illegible] fact, although the [illegible] plied by the [illegible] it is [illegible] to [illegible] ly lack out [illegible] from each [illegible] the [illegible] [illegible] the [illegible] [illegible] [illegible] [illegible] they have given it. The work of [illegible] is [illegible] sufficient [illegible] the duties of [illegible] to [illegible] The situation [illegible] is necessary for [illegible] to carefully examine all the testimony as it [illegible] in the record.

The plaintiff Wulbert, a duly licensed real estate broker, testified that he first met the defendant while he was at work on the property which is the subject of this controversy, in December, 1922; that the defendant told him he was the owner of the building, and he told the defendant he was a real estate broker and gave him his name and handed him a card; that the defendant stated he wanted to sell the building and his price was $26,500, and in this connection he testified that the defendant said that "he will pay me my usual commission, and he had a first mortgage of $15,000 and he wants about $8,000 cash and the balance he will make arrangements with the buyer, as a second mortgage;" that he told the defendant he had people in view and would submit the building and try to make a deal. Plaintiff further testified that he later submitted the building to Mr. and Mrs. Harry Rubin, (not related in any way to the defendant) whom he knew to be in the market for a building of this nature; that he talked to them no less than a dozen times and took Mrs. Rubin over to look at the building, which was then in process of construction. Mr. and Mrs. Rubin had a delicatessen store, and the plaintiff testified that owing to the fact that it was necessary for one of them to remain in the store, Mr. Harry Rubin did not accompany them when he took Mrs. Rubin to look at the building; that the witness took Mrs. Ruvin into the building and they had a talk with the defendant about the price. - "Mrs. Rubin tried to depreciate the rate of the building," - and she finally fold the defendant she would talk it over with her husband; that they were there about an hour. The plaintiff's testimony was further of the effect that Harry

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The [illegible] Holly [illegible]
broker, testified [illegible]
was at work on [illegible] in this
controversy, in [illegible], 1929, [illegible]
he was [illegible] owner of the building, [illegible]
ent [illegible] a real estate broker [illegible] and
handed him a [illegible] the [illegible] asked him to [illegible]
sell the building [illegible]
connection he testified that [illegible]
will pay me my usual commission, and [illegible]
gage of [illegible]
balance [illegible]
second mortgage [illegible]
in view [illegible]
deal. [illegible] testified [illegible] submitted
the building to [illegible] (not related in
any way to the [illegible]) [illegible]
for a building of [illegible]
than a dozen [illegible]
building, [illegible] construction.
and [illegible]
testified [illegible]
one [illegible]
not necessary [illegible] the
building that [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

Rubin never went over to the building with the plaintiff, but that he talked the matter over with both him and his wife many times after she had visited the property with the plaintiff.

The plaintiff testified further that he found out the following spring that the defendant had sold this building to the Rubins and he then saw the defendant and wanted to "find out the reason why they left me out," and that the reason given by the defendant was that "I had not introduced Harry Rubin to him, but Mrs. Rubin, so Harry Rubin approached him when he made the deal and he made the deal with Harry Rubin without knowing it was the husband of the woman I introduced to him * * * and when he finally met Mrs. Rubin and recognized it was the same party, he claimed that he made an effort or wanted to make an effort to get in touch with me but didn't know my address. * * * He asked David Horwitz whether he knew a broker by the name of Morris Wulbert because he thinks Morris Wulbert has to be taken care of! The plaintiff also testified that in that conversation the defendant told him that he had protected himself by putting a clause in the contract. "that in case I will sue him for the commission, theburden of compensating me will fall on the buyer," and that he also said, "if you will sue me I will be against you but go ahead and sue the buyer;" that the plaintiff replied that he did not believe he could sue the buyer, because his understanding was with the defendant, that the defendant would pay the plaintiff for his efforts, in case he sold the building. A certified copy of the deed from the

Hubin never went over to the building with the plaintiff, but then he called the matter over with Dwyer and the wife many times after she had visited the property with the plaintiff.

The plaintiff testified further that he found out the following morning that the defendant had sold the building to the Dubins and he then saw the defendant and wanted to "find out the reason why they left me out," and that the reason given by the defendant was that "I had not introduced Harry Dubin to him, but mine. Dubin, so Harry Dubin approached him when he saw the deal and he saw the deal with Harry Dubin at a meeting. It was the husband of the woman I introduced to him." The man was finally met via. Dubin and recognized it was the same party, he claimed that he made no effort or wanted to make no effort to get in touch with me but didn't know my address. " " he asked David Barnett whether he knew a broker by the name of Harris Hubert because he thinks Harris Hubert has to be taken care of. The plaintiff also testified that in this conversation the defendant told him that "a few months himself by putting a clause in the contract. 'That is what I will use this for commission, regardless of conveyancing we will pay the buyer,' and then he also said, 'If you will sue me I will be against you but if about the property' that the defendant testified that he did not believe he could use the buyer, because his understanding was with the defendant, that the defendant would pay the commission for this effort, in case he sold the building. A certified copy of the deed from the

defendant and his wife to "Harry Ruben" was introduced in evidence. It was admitted the property was sold by the defendant to Harry Rubin for a consideration of $26,200. The plaintiff testified that the usual and customary fee charged by real estate brokers in the city of Chicago, in transactions in the nature of the one involved in the case at bar, was "3 per cent for everything over $10,000" and that "according to that it would be 3 per cent of the amount of the sale price of this property."

On cross-examination the plaintiff testified that when he approached Harry Rubin again (apparently meaning after he had shown the property to Mrs. Rubin) trying to close the deal with him, he found him reluctant to discuss any matter about the property and when he later approached the defendant about the deal "I found him much cooler on the proposition and I couldn't account for the reason."

On re-direct examination the plaintiff testified that when he visited the defendant's property with Mrs. Rubin, he explained to the defendant that Mr. Harry Rubin was not able to come to look at the property, because he and his wife could not both leave their store at the same time and "I told him exactly what Harry Rubin told me, that if Mrs. Rubin is satisfied with the building, it is satisfactory to him."

One Horwitz testified that he was a real estate broker and knew both the parties to this case; that he was the one who negotiated the first mortgage on the defendant's property; that after the sale of this property he

defendant and his wife "Harry Wood" was introduced in evidence. It was admitted the property was sold by the defendant to Harry Dubin for a consideration of $80,000. The plaintiff testified that the usual and customary fee charged by real estate brokers in the city of Niagara, in transactions in the nature of the one involved in the case at bar, was "3 per cent for everything over $10,000" and that "according to that it would be 3 per cent of the amount of the sale price of this property."

On cross-examination the plaintiff testified that when he approached Harry Dubin again (apparently according after he had shown the property to him, which) trying to close the deal with him, he found him reluctant to discuss any matter about the property and was later approached the defendant about the deal "I heard his side matter on the negotiation and I didn't account for the reason."

On re-direct examination the plaintiff testified that when he visited the defendant's selling property (the Wood, he explained to the defendant that Harry Dubin was not able to come to look at the property, because he said he said he would not buy Harry Dubin's wife would come. "I told his exactly that Harry Dubin not, no, that if the Dubin is satisfied with the building, it is satisfactory to him."

The learned trial judge in the case appeal [illegible] broker and asked both the parties to take a [illegible] the one who negotiated the first [illegible] on the defendant's property that after [illegible] Dubin's wife [illegible] be

had a conversation with the defendant about the sale, in which the defendant said that at the time the deal was closed "he thought the party, the lady buyer, that is the wife of the purchaser, was brought by Mr. Wulbert to the building. He wasn't positively certain about it, but he thought she was brought to the building by Mr. Wulbert and that he didn't know Wulbert very well, that he didn't know where to locate him and he just passed the matter up." This witness testified that he discussed the same matter with the defendant later, on one or two occasions, and, in one of those conversations the defendant said he "thought he couldn't do anything in the matter because he wasn't certain at the time of the closing of the deal; that the buyers claimed that they were not submitted at the building by anybody, that they came there themselves or probably with a party ny the name of Kaplan. I recollect that a Mr. Kaplan was associated in this deal and that they were not submitted at the building by Wulbert at all. - That was the substance of the second conversation." On cross-examination this witness, said that the defendant told him "there was something funny about this deal," that he thought the woman referred to was brought there by a man named Wulbert". The witness stated that he later told the plaintiff of this conversation.

Mrs. Harry Rubin was called as a witness by the plaintiff. She testified that before the defendant's property was purchased by her husband, she went to look at the building with the plaintiff, but that before she went to look at it, the plaintiff had not talked the matter over with

had a conversation with the defendant, about the wife, in which he did not mend said that by the time a deal was closed "he should be nearly, Mr. Lady Duvers, that is the wife of the purchaser, was brought by Mr. Wilbert to the building. He could positively not tell about it, but he thought she was brought in now & then by Mr. Wilbert and that he didn't know Mr. Wilbert very well, that he didn't know where to locate him and so just passed the matter up." This witness testified that he thought the same matter was the thing next later, on one or two occasions, and, in one of those conversations the witness said he "thought he couldn't do any thing in the matter because he wasn't certain as to the time of the theft of the wife that the buyers claimed that they were not satisfied at the building by anybody, that they came to it on themselves or probably with a party by the name of Hughes. I could not tell a Mr. Hughes was mentioned in this deal and that they were not satisfied at the building by a lady or all. - that was the substance of the second conversation." On cross-examination this same witness, said that the defendant told him "there was something funny about the deal." and he thought the woman referred to was brought there by a man named Wilbert". The witness stated that he never told a detective of this conversation.

Mrs. Mary Robin was called as a witness by the plaintiff. She testified that she had a conversation with Perry & a conversation by her husband, she went to look at the building with the detective. Perry did not come. She went to look at it, the detective had her talked to another lady with

her husband, but only with her, at a time when her husband was not present, and that so far as she knew the plaintiff never discussed the deal with her husband. She denied seeing the defendant at the property at the time she visited it with the plaintiff, and said that when they went to the property they were not able to get into the building and she talked with no one there. She was asked if the plaintiff told her the price of the building before he took her over there and she said he did not, and that she did not ask what the price was nor did she tell him what kind of a building she wanted nor how much money she wanted to spend, and that the plaintiff did not ask her any questions on that subject. On cross-examination, she testified that the plaintiff did not introduce her to the defendant. She was then asked, "Did Mr. Wulbert say anything about the husband, or Harry Rubin to Hymant" (defendant) Her answer was, "No sir, it was too cold. There was no windows in or anything to stand on." She testified that the plaintiff and the defendant did not, in her presence, at that time, discuss anything about the price and that the plaintiff did not tell her "that this man working there in working clothes was the owner." She testified that the first time she met the owner was several weeks after she and her husband had moved into the property. She testified that her husband bought this property and she had nothing to do with it, and she never talked with her husband about the transaction at all and he never discussed it in her presence. On re-direct examination she testified she knew she was going to look at this building, and she was

her husband, but only with her, or a tired man her husband was not present, or when he is too busy for visiting before discussing the deal with her husband. The British employing her daughter at the property at the time she visited it with the insurance, and only this week, on a visit to the property they were not able to get into the building and the talked with no one there. The one [illegible] her the price of the building [illegible] she said he did not, and that she did not [illegible] the price she not did see well. He then told her a [illegible] not how much money she rented [illegible] the building [illegible] conversation, she telling [illegible] conversation, and telling [illegible] dance her to the [illegible] "Do [illegible] Mulvert say anything about [illegible] Hymen" (defendant) [illegible] coin. There was no [illegible] the transfer [illegible] in her possession, at that time, [illegible] price and that the plaintiff [illegible] man for leg [illegible] [illegible] [illegible] weeks after she [illegible] the building that her husband [illegible] and nothing to do with it, [illegible] hand among the transaction [illegible] her [illegible] time she was going to look at this building. [illegible]

then asked if the plaintiff came to her store and talked about the building, and she answered, "Not that I know anything about." She was asked if she ever saw the plaintiff in her store and she answered, "After while, in the spring." The visit which she admitted making with the plaintiff was in December. She was asked on cross-examination whether she told her husband she had seen the building and she answered, "No sir, because I had heard nothing of it, I had nothing to say." She admitted she had no intention of buying the building herself, and her only purpose in going to see it was to come back and report to her husband; but she insisted she did not tell her husband she was going to see it, nor after she returned did she tell him she had seen it.

The defendant testified that he first met the plaintiff in December, in the basement of the building he was then constructing, and which he later sold to Harry Rubin; that the plaintiff asked the defendant if he owned the building and he said he did; and he then asked him if he wanted to sell it and the defendant replied that he did, and the plaintiff then asked how much he wanted for it, and he replied that he did not know as yet, for the building was not ready to sell; and he told the plaintiff he had better wait until later. He further testified that the plaintiff said he thought he could get a good price for it, but he did not mention any price but said he might sell when the building was nearer completion. The defendant denied that the plaintiff gave him a order or stated that he

then asked if the plaintiff could [illegible] and talked about the building, and she remarked, "for that I [illegible] anything else." [illegible] said it was even now the intention to see about the assessment, "after which, in the spring." The visit to the existing [illegible] the plaintiff's in December. [illegible] cross-examination whether she had her husband who had run the building and who managed, "He did, because I had asked nothing of it, I had nothing to do." The adviser [illegible] tion of buying the building [illegible], and her [illegible] in going to see it was to [illegible] husband; but she [illegible] and [illegible] and was going to see it, and [illegible] tell him she had seen it.

The cell-room business that is first set by plaintiff in December, in the [illegible] be the same construction, [illegible] Henry Rubin; that the plaintiff knew the [illegible] it be owned by nothing [illegible] asked the [illegible] that he did, and [illegible] for it, [illegible] the building was not ready to sell; [illegible] will be the better [illegible] that the plaintiff [illegible] for it, [illegible] sell also the building [illegible] stated that the plaintiff [illegible]

was a real estate man, or that he, the defendant, told the plaintiff he would give him a commission for the sale of the building.

The defendant said he first met Harry Rubin in January, when one Kaplan introduced him to Rubin. At another point he testified that he had previously met Harry Rubin in December, but that the plaintiff never introduced Rubin to him and he never saw the plaintiff and Rubin at the same time, and that the plaintiff never mentioned Harry Rubin to him prior to April 1923. He testified that the first time he ever saw Mrs. Rubin was when he visited the building several weeks after the Rubins moved into it. He admitted knowing Horwitz but denied meeting him and Harry Rubin together. (Horwitz had not testified to any such occurrence. His testimony was that while he and the defendant were together they had met the plaintiff, - not Harry Rubin.) The defendant admitted having a conversation with the plaintiff but apparently when he claimed Horwitz was not present, and he said he told the plaintiff in that conversation that he had sold his property to a man named Kaplan and that Kaplan had sold it to Harry Rubin, and he told the plaintiff that he (the plaintiff) never introduced Harry Rubin. The defendant testified that he did not talk to Horwitz about the plaintiff's claim before he had this conversation with the plaintiff, and that Horwitz was not present at the time of that conversation.

The defendant testified that at the time he sold the property to Harry Rubin, he had no infomation that the

was a real estate man, or just so, the defendant, said the plaintiff he would give him a commission for the sale of the building.

The defendant said he first met Harry Rubin in January, when the Rubin introduced him to Rubin. At another point in testified that he had previously met Harry Rubin in December, but that the plaintiff never introduced Rubin to him and he never met the plaintiff and Rubin at the same time, and that the plaintiff never [illegible] Rubin to his office in April 1964. He testified that the first time he ever saw Rubin was when he visited the building several weeks after the Rubins moved into it. He admitted receiving Rubin's [illegible] posting him of Harry Rubin together. (Morris [illegible] conditions to any such conversation. He testified that while he was in the conversation Harry Rubin [illegible] - not Harry Rubin.) The [illegible] testified [illegible] the plaintiff had [illegible] as [illegible] were not present, and he [illegible] tion that he [illegible] that Rubin had said it to Harry Rubin, not to the plaintiff that he (the plaintiff) never [illegible] Harry Rubin. The defendant testified that he did not talk to Morris about the plaintiff's alleged [illegible] conversation [illegible] plaintiff, and that Morris did [illegible] conversation.

The defendant testified that at the time he [illegible] property to Harry Rubin, he had no information that [illegible]

latter had any connection with the plaintiff or that the plaintiff had shown the building or talked about it either to Harry Rubin or his wife.

On cross-examination the defendant denied the conversations testified to by Horwitz. He further testified that when he sold the property, his contract was supposed to be with Kaplan; and when the lawyer was drawing the contract Kaplan took the property in Harry Rubin's name, for some reason he could not find out; that Kaplan introduced Rubin to him (the defendant) but that Rubin did not ask anything about the price nor did he give him a price; that he never talked to Rubin but did talk with Kaplan who agreed to the price of $26,500; that he never saw Rubin until they went to the lawyer's office to sign the contract closing the transaction. The defendant admitted he had paid no commission on this sale. He admitted he had made an agreement with Harry Rubin that if any commission was to be paid on the sale, Harry Rubin would have to pay it. He insisted that the man he was afraid of was Kaplan because he knew Kaplan was a real estate man, and when the contract was made out, calling for the sale being made to Harry Rubin, he suspected Kaplan would be calling for a commission, and that was why he had the contract provide that if any commission was to be made on the transaction, it must be paid by Harry Rubin.

One Grodson, a lawyer, testified that the contract for the sale of this property was executed at his office; that the defendant had discussed the deal with him a short time before that and when the deal was closed Harry Rubin was present and he thought Mrs. Rubin was also present. He

Jackson had any knowledge with the liability of that the plaintiff had been the [illegible] [illegible] to Mary Ruth or his wife.

On cross-examination the defendant denied the conversations attributed to by witness. He further testified that when he said to the witness, his counsel was supposed to be with Hyland; and when the letter was showing the contents Mr. Jackson had the conversation in Mary Ruth's name, for some reason he could not tell why that Carlson introduced Hodge to him (the witness) but that Carlson did not use anything about the price nor did he give him a price; that I never talked to Hodge but the last with Hyland was present to the terms of the letter; that he never was there until they had [illegible] to sign the contract closing the transaction, [illegible] and admitted he had said [illegible] to the wife. He admitted he [illegible] if they commenced [illegible] would have to pay it. He admitted that [illegible] afraid of the Hyland business in case [illegible] was, and when the [illegible] being made to Mary Ruth, [illegible] selling for a [illegible] that provide that [illegible] strangers, it must be [illegible].

In rebuttal, [illegible] for the sale of this property [illegible] that the defendant [illegible] time before [illegible] was [illegible] which was produced [illegible] [illegible].

testified that at the time the defendant talked this deal over with him, prior to the occasion when the contract was executed, he asked the defendant who he was selling the property to and his recollection was that the defendant said Kaplan was buying the property. He was asked how he drew the contract showing Harry Rubin as the purchaser, and he answered that as he remembered it, when he started to dictate the contract Kaplan spoke up and told him to have Harry Rubin appear as the buyer. He testified that his client, the defendant, stated that he wanted to protect himself, and he called attention to the fact that Kaplan was a real estate man and he wanted to be protected on commissions.

Kaplan testified that he was in the real estate business, buying and selling for himself, but that he did not have a license as a broker in 1933; that he first met the defendant in 1932 when he was looking up property for sale, and he tried to buy the defendant's property but the defendant would not sell it because it was not completed; that the property looked as though it would suit him, and he returned the next day and saw the defendant again in an effort to buy it. He further testified that he made an appointment to close the contract "in a week's time," and in the meantime he found another piece of property which he liked better; and he then saw Harry Rubin and told him "I don't know what to do," - that he thought the defendant's property was a good buy but he had found some other property which he wanted to take and he told Rubin that if he wanted to buy the defendant's property he would be responsible for its

[illegible] over with him. Mr [illegible] explained the situation, [illegible] excitedly, he asked [illegible] was to work [illegible] property [illegible] the [illegible] with Lydia was [illegible] to [illegible]. [illegible] been to draw the contract covering every Indian as a [illegible]. And he answered that he [illegible] it, when he [illegible] to discuss the [illegible] Indian people by and told him to have every Indian appear as the buyer. To [illegible] that his client, the defendant, stated that he wanted to [illegible] directly, and he called attention to the fact that was a real estate man and he [illegible] to be [illegible] on commission.

Evelyn testified that he was in the real estate business, buying and selling for himself, but that he did not have a license as a broker in 1923; [illegible] he first met the defendant in 1921 when he [illegible] Lookingglass for sale, and he tried to buy the defendant's property but the defendant could not sell it because [illegible] that the property belonged to [illegible] and he [illegible] to buy it. He further testified that [illegible] to close the contract "in a reasonable time," [illegible] he found another person [illegible] property which he [illegible] history and he then was sorry. [illegible] "I don't know what to do," - that [illegible] the defendant's property was a good buy and he [illegible] other property which he [illegible] to take it. [illegible] if he wanted to buy the Indian girl's property he could. [illegible] for the

completion according to specifications, and Harry Rubin said he would let him know about it; that he made an appointment with Harry Rubin next day, to make a contract, and he decided to take the property and went to Grodson's office to close the deal. He testified further that he did not know the plaintiff at that time and that when the contract was drawn and executed, no mention was made of any claim for commissions by the plaintiff. The witness stated that no commission was allowed or paid to anyone on this sale from the defendant to Harry Rubin. He said he introduced Harry Rubin to the defendant at the time the contract was closed in the lawyer's office.

On cross-examination Kaplan was asked whether he made any money out of this transaction and he answered, "No, sir. He gave me -- I don't call this any money -- he gave me a per cent for my services, $200.00. Mr. Harry Rubin, for my trouble, what I spend so much time on." He then testified that he went over and saw the defendant's building, to buy it himself, but he signed no contract and advanced no money, and before closing the deal he found another piece of property he liked better. He was asked whether he bought that other property and he said he did not, but he "sold it to a man on West Madison street." He said he felt it was up to him to sell the defendant's property for him and he then went and saw Harry Rubin and got him to buy the defendant's building. He was asked whether he heard the defendant tell the lawyer at the time the contract was closed, that the buyer of his

completion according to specifications. [illegible] Harry Martin said he would let him know about [illegible] and he made an appointment with Harry again next day, to make a contract, and [illegible] the attorney and went to Goodman's office to close the deal. He testified further that he did not [illegible] when the contract was drawn and executed, [illegible] made of any claim for one half by the plaintiff. The witness stated that he never [illegible] anyone on this side [illegible] again. He said he introduced [illegible] at the time the contract was closed in the lawyer's office.

On cross-examination Martin was asked whether he made any money out of this transaction and he answered, "No, sir. [illegible] this money -- he gave [illegible] Harry [illegible]. He then testified [illegible] ment's building, [illegible] tract and [illegible] he found another piece of property [illegible]. He was asked whether he [illegible] property and he said he did not, but he [illegible] street." He said he [illegible] Harry [illegible] building. He was asked whether he [illegible] at the time the contract was [illegible]

property was Harry Rubin, and he answered, "Yes, sir." He was asked if he ever took Harry Rubin over to see the defendant before they went to the lawyer's office and he said he did, about a week before. He was then asked if he had not just testified, on direct examination, that he introduced these parties for the first time at the lawyer's office, and he then explained, that when he took Harry Rubin over to the building he didn't see the defendant there.

Harry Rubin testified in behalf of the defendant that he first met the latter at the lawyer's office at the time the contract was executed; that Kaplan had talked to him about the property previously and that the first time he knew anything about the existence of this property was when Kaplan took him over to see it. He was asked if his wife had talked with him about it prior to his entering into the contract to buy it, and he answered that she never mentioned it to him. He was asked if she told him that the plaintiff had taken her over to look at the building and he said she had not "because I lived a distance from the store. * * * and she was in condition that she never come to the store;" and that she had not been there for a month or two before the contract was executed, and he first learned of the building through Kaplan, who came into the store one day and told him that he had made a deal with a contractor to buy a building which was under construction, and he was willing to guarantee that the construction would be completed properly, and that Kaplan came back a few days later and said he was in a little trouble; that he had made arrangements

for the contractor previously referred to to make a contract the following day, but he had found another piece of property to buy "and I think I will be short of money, and if you will be interested in this proposition I can show it to you and if you like it, I will transfer this deal over to you." He testified that he then went to the property with Kaplan and looked it over and inquired the terms on which it was offered for sale and Kaplan told him what the terms were and added, "now, if you like the building tell me and if not I can turn it over to somebody else;" that he asked Kaplan what he would take for the contract and Kaplan said he had not made any contract, and he then asked him what he would take for the trouble and Kaplan said whatever he, the witness, thought was right. He testified that he then called up the defendant and made arrangements for closing the contract. He was asked if his wife or anybody else had ever mentioned the plaintiff's name in connection with the property and he answered, "Never mentioned a word." He then said that when the deal was closed the defendant got suspicious of Kaplan, thinking he was an agent and would want a commission, and therefore the provisions already referred to, covering the question of commissions, was put in the contract.

On cross-examination this witness was asked what he paid Kaplan the $200.00 for, and he answered, "If a man goes to a lot of trouble and works on it for a week or ten days and then comes to the conclusion I think it wasn't enough, $200.00 He should have gotten more for it, especially when the building is under construction and he puts in a specification to make up everything short in the building." He was

for the contractor previously retained to be made a contract the following day, but he had found another piece of property to buy "and I think I will be above of money, and if you will be interested in this proposition I can show it to you and if you like it, I will transfer this deal over to you." He explained what he then went to the property with Lapham and looked it over and inquired the terms on which it was offered for sale and Lapham told his whatever terms were and added, "now, if you like the building tell me and if not I can turn it over to somebody else;" that he asked Lapham what he would take for the contract and Lapham said he had not been any contract, and he then asked him what he would take for the trouble and Lapham said whatever he, the stranger, thought was right. He hesitated but he then called up the defendant and was arrangements for closing the contract. He was asked if the wife or anybody else had ever conferred the plaintiff's name in connection with the city and he answered, "Never mentioned a word." He then said that when the last was closed the defendant got acquainted of Lapham, thinking he was an agent and could get a commission, and therefore the proposition already referred to, concerning the question of commission, was put in the contract.

On cross-examination this witness was asked what he paid Lapham the $300.00 for, and he was asked, "I'm not good to a lot of trouble anyway, so it for a week or ten days and then come to the conclusion I think it wasn't enough, $300.00 he should have gotten more for it, especially when the building is under construction and he puts in a specification to make up everything about in the building." He was

asked if he made Kaplan a present of the $200.00, and he said he did. He further testified that he never heard of the plaintiff until several months later, and had never seen him in his store or anywhere else before that. He further testified on cross-examination that his wife had not been in the store for 8 months, and a few lines farther on, in the record, is an admission that she was in the store in December and also in November, but he said that was "about the last month." It appears she had a child born sometime in the spring or late winter. This witness further stated on cross-examination that his wife had not been over to look at the building. He was asked if his wife had any money of her own and he said she had not. He said he knew nothing whatever about her going over to look at the building. He was asked on cross-examination whether he knew that if the defendant was required to pay the commission for which he was being sued, he would turn around and sue the witness for it, and he answered, "Absolutely." Further, in cross-examination, this witness testified that when they were in the lawyer's office to close the deal and sign the contract the defendant spoke up and said, "I don't want Kaplan in the contract." He was then asked: "And you had not told Hyman Rubin (the defendant) that you were going to be the buyer, up to that time had you?" and he answered, "No sir."

The foregoing statement of the substance of the testimony of the various witnesses will not require extended analysis or comment. According to the defendant and Kaplan, the former never heard of Harry Rubin until Kaplan introduced him to the defendant at the lawyer's office, but

asked if he made Lapham a present of the $200.00, and he said he did. He further testified that he never heard of the plaintiff until several months later, and had never seen him in his store or anywhere else before that. He further testified on cross-examination that his wife had not been in the store for a month, and a few times further on, in the record, in an explanation that she was in the store in December and also in November, but he said that was "about the last month." It appears she had a child born sometime in the spring or late winter. This witness further testified on cross-examination that his wife had not been over to look at the building. He was asked if his wife had any money of her own and he said she had not. He said he knew nothing whatever about her going over to look at the building. He was asked on cross-examination whether he knew that in the deed but was required to pay the consideration for which he was being sued, he would turn around and use the witness for it, and he answered, "Absolutely." Further, in cross-examination, this witness testified that when they were in the lawyer's office to close the deal and sign the contract the defendant spoke up and said, "I don't want Lapham in the contract." He was then asked: "And you had not told Lyman Smith (the defendant) that you were going to be the buyer, up to that time had you?" and he answered, "No sir."

The foregoing statements of the substance of the testimony of the various witnesses will not provide extended analysis or comment. According to the statement one Lapham, the former owner heard of [illegible] and Lapham interrogated him as the defendant at the lawyer's office, and

the testimony of the various witnesses will not provide extended analysis or comment. According to the statement one Lapham, the former owner heard of [illegible] and Lapham interrogated him as the defendant at the lawyer's office, and

when the defendant's witness, Harry Rubin, testifies he says that he called up the defendant after he had agreed to take the property and the defendant "told me he would go the following night to sign the contract," and he, the witness, then called up his lawyer and arranged for the conference at the office of the defendant's lawyer. Although Kaplan admits that he was not in the real estate business as a broker when this contract was made but that his arrangement was to buy the property himself, the explanation of the clause in the contract about commissions is that the defendant was afraid of Kaplan, and although Kaplan admits that he had made no contract to buy the property and had paid nothing down on it, he went to Harry Rubin and got him to buy the property because he, Kaplan, had found another piece of property that he liked better; and then he admits that he didn't buy the other property but sold it to someone else. His testimony as well as that of Harry Rubin gives the impression that when Harry Rubin concluded to take the defendant's property, he was doing Kaplan a favor, and yet it appears that he paid Kaplan $200.00 for doing him that favor. It is difficult to see how one could possibly read this testimony without coming to the conclusion that Kaplan was representing Harry Rubin all through the deal and when the clause about commissions was put in the contract, at the defendant's request, he was seeking to protect himself, not against Kaplan butagainst the plaintiff. To set forth all the inconsistencies in the defendant's position and all the material discrepancies of the testimony of himself and his witnesses, would extend this opinion beyond a reasonable length, nor is it necessary to do so, because these matters

when the [illegible]'s claims, [illegible] testifies to
were that he [illegible] the [illegible]
to take the property and the defendant's claim to be should
be the [illegible] to give the distinct, [illegible], the
witness, [illegible] the [illegible] and [illegible] for the one-
fourth of the [illegible] of the [illegible] lawyer, although
[illegible] that he was not a [illegible] witness
as a broker when [illegible] but that the [illegible]
must see to buy the property himself, the [illegible]
clause in the contract [illegible] the defend-
ant [illegible] fraud of [illegible], [illegible] admits that
he had made no [illegible] to buy the property [illegible]
nothing done on it, he [illegible] buy the property himself, [illegible]
of property that [illegible] [illegible]
[illegible] the [illegible]
his testimony [illegible]
[illegible] to [illegible]
[illegible] property, [illegible]
[illegible] that he [illegible]
It is difficult to [illegible] testimony and the
testimony without [illegible] the [illegible]
was [illegible]
the clause about [illegible] but in the [illegible]
defendant's [illegible], [illegible]
against [illegible] the [illegible]
the [illegible] in the [illegible]
material [illegible] the [illegible]
his witness, would [illegible]
length, [illegible]

are quite apparent from a mere reading of the testimony. It may be said that the testimony given by Mrs. Harry Rubin, who was called as a witness by the plaintiff, was not such as to support the plaintiff's contentions. It is clear, however, that this witness was a hostile witness who was making every effort to protect the defendant because she realized that under the terms of the contract, any commission the defendant might be obliged to pay the plaintiff, would ultimately come out of her husband. Not only may it not be said that the verdict is against the manifest weight of the evidence, as contended by the defendant, but in our opinion, the evidence is such that no other verdict than the one returned, would be possible.

The defendant complains that the court permitted the plaintiff to testify, over defendant's objection, to the names of persons he had taken to look at the defendant's building. It is contended that this testimony was immaterial and prejudiced the rights of the defendant. The plaintiff was asked, on direct examination, whether he had taken other people to see the defendant's building. The question was answered in the affirmative without objection, counsel for the defendant interposing the question, "When?" The plaintiff was then asked, presumably by his own counsel, how many different people he had taken over to the property, and he answered that he was not able to say how many, but it was quite a few. Then the record shows that counsel f the defendant interposed an objection and his obj sustained. Later, while plaintiff was being exam counsel for the defendant, the latter went into th

are quite separate from a mere reading of the testimony.

It may be said that the testimony given by Mr. Harry Rubin, who was called as a witness by the defendant, was just such as to support the plaintiff's contention. It is clear, however, that this witness was a hostile witness who was anxious, early without to protect his interest, because she realized that under the terms of the contract, any consideration the defendant might be obliged to pay the plaintiff, would ultimately come out of her pocket. The only way it not be said that the verdict is against the manifest weight of the evidence, as contended by the defendant, but in our opinion, the evidence is such that no other verdict than the one rendered, would be possible.

The interest compelling this court to set aside the plaintiff's verdict, more correctly objection, is the manner of proceeding in the trial court to test as to the value of a vacant building. It is contended that this testimony was immaterial and incompetent in view of the pleading. The plaintiff was asked, on direct examination, whether he had taken other people to see the defendant's building. The question was answered in the affirmative without objection, counsel for the defendant interposing the question, "Didn't you tell him it was worth, personally speaking, one million, two hundred different people do not agree over to the property, and he answered that he did not agree to any particular, but it was only a lot. Then the record shows that counsel for the defendant interposed an objection [illegible] sustained. Later, while plaintiff was also on counsel for the defendant, the latter went into the

himself and asked the witness a half dozen questions about it; and when the defendant took the stand, his counsel again referred to the question and asked the defendant whether the plaintiff brought other people over to see the building. On that record, the defendant is certainly not in position to allege that the trial court erred in the matter of this testimony. As will be seen from the above, the trial court sustained the only objection counsel for the defendant interposed in the matter.

The remaining point urged by the defendant has to do with instructions. It is contended the trial court erred in giving the jury an instruction to the effect that "If under the evidence in this case and the instructions of the court they find the issues in the case for the plaintiff, then and in such case they should allow the plaintiff the usual and customary charges for such services, as shown by the preponderance of the evidence, if any." That instruction was proper. The plaintiff testified that in his first talk with the defendant the latter told him that he would "pay me my usual commission," and he testified further that the usual and customary fees, charged by real estate brokers in the city of Chicago, in transactions such as the one involved here, was 3 per cent on the purchase price, where that was over $10,000. No evidence was introduced to the contrary, as to what theusual and customary commission was, and it was for the jury to determine from the conflicting evidence, whether the defendant had promised to pay the usual and customary commission, as the plaintiff contended.

blandly and calm. His witness a half dozen questions and it; and then the defendant took the stand, his counsel again returned to the examination and asked the defendant whether the plaintiff brought money [illegible] over to him on Monday, on that record, the evidence is certainly not in condition to allege that the trial court erred in the matter of this testimony. As will be seen from the above, the trial court sustained the only objection counsel for the defendant interposed in the matter.

The remaining error urged by the defendant has to do with instructions. It is contended the trial court erred in giving the jury an instruction on the effect that "if under the evidence in this case and the instructions of the court they find the issues in the case for the plaintiff, then and in such case they should allow the plaintiff the usual and customary charges for such attorneys, and shown by the stipulation of the evidence, if any." The instructions are proper. The plaintiff [illegible] the first trial with the defendant the letter to [illegible] in that he would "pay the usual commissions," and he instructed the lawyer that the usual and customary fee, charged in real estate matters in the city of [illegible], is [illegible] the sum he involved [illegible] was 5 per cent on the [illegible] price, when that was over [illegible]. The evidence was introduced to the contrary, so the court [illegible] customary commission rate, and it was for the jury to determine from the conflicting evidence, whether the defendant [illegible] to pay the usual and customary charges, in the [illegible] contended.

The defendant also complains of an instruction given by the court, telling the jury that while the burden of proof is upon the plaintiff and it was for him to prove his case as alleged in the declaration, by a preponderance of the evidence, still, if the jury found that the evidence bearing upon the plaintiff's case preponderated in his favor, "although but slightly, it would be sufficient for the jury to find the issues in his favor, and to find a verdict against the defendant." We have never known that stock instruction to be called in question before. The giving of the instruction was not error.

Complaint is also made of an instruction given by the court, telling the jury that if they believed from the evidence that the defendant authorized the plaintiff to find a purchaser for the property in question, and that the plaintiff accepted the employment and was the efficient or "producing" cause in bringing about a consummation of the purchase of said property, then the plaintiff would be entitled, in the absence of an express agreement, to the usual and customary charges made by real estate brokers in the city of Chicago at said time, as shown by a preponderance of the evidence, if any. It is contended that this instruction was erroneous in that it omitted the element of the terms or conditions of the alleged employment, and that before the plaintiff could recover, it was necessary for him to show that the property had been purchased by the buyer on terms theretofore agreed upon between the plaintiff and the defendant. In our opinion the contention is not sound.

The defendants also complained of an instruction given by the court, telling the jury that while the burden of proof is upon the plaintiff and it was for him to prove his case as alleged in the declaration, by a preponderance of the evidence, still, if the jury found that the witnesses bearing upon the plaintiff's case participated in the fraud, "although not slightly, it would be sufficient for the jury to find the issues in favor, and to find a verdict against the defendant." We have never known that such instruction to be called in question before. The giving of the instruction was not error.

Complaint is also made of an instruction given by the court, telling the jury that if they believed from the evidence therein detailed authorized the plaintiff to find a purchaser for the property in question, and that the plaintiff accepted the employment and was the efficient or "producing" cause in bringing about a consummation of the purchase of said property, then the plaintiff would be entitled, in the absence of an express agreement, to the usual and customary charge made by real estate brokers in the city of Chicago at said time, as shown by a preponderance of the evidence, if any. It is contended that this instruction was erroneous in that it omitted the element of the terms or conditions of the alleged employment, and that before the plaintiff could recover, it was necessary for him to show that the property had been purchased by a buyer on terms satisfactory upon motion of the plaintiff and the defendant. In our opinion the objection is not sound.

If, as the plaintiff's evidence tended to show, the defendant agreed to pay the plaintiff the usual and customary commission if he produced a purchaser of the defendant's property, and he named a price of $26,500, and the plaintiff was the means of interesting Mr. and Mrs. Rubin in the property, and Harry Rubin bought it, but at a price of $26,200 or $26,300, the mere difference in the consideration paid for it would not defeat the plaintiff's right to a commission. The plaintiff's proof tended to show, not that the defendant agreed to pay a commission if someone was found and bought the property at $26,500, but the plaintiff's testimony was to the effect that the defendant stated his property was for sale and that he would pay the plaintiff the usual and customary commission in case he found a purchaser, and when the plaintiff asked the defendant what his price was he named the figure, $26,500. In other words, there is no evidence showing or tending to show that the defendant's agreement to pay the commission was conditioned upon his getting his asking price. Neither is there any evidence in the record showing or tending to show that after the plaintiff had interested Mr. and Mrs. Harry Rubin in the property, they abandoned the idea of buying it, and that their ultimate purchase of the property was due to the efforts of Kaplan or anybody else.

The defendant also complains of another instruction given by the trial court, in which the jury were told that if they believed from the evidence that the defendant employed the plaintiff as his agent to negotiate a sale of the defendant's property, and the plaintiff undertook said employment and was the efficient or pro-

If, as the plaintiff's evidence tended to show, the defendant agreed to pay the plaintiff the usual and customary commission [illegible] property, and he made a price of $26,500, and the plaintiff was the cause of introducing us, and we, owing to the property, and Harry Rubin bought it, it's at a price of $26,500 or $28,500, the mere difference in the consideration paid for it was not defense the plaintiff's entitled to a commission. The plaintiff's proof tends to show, not that the defendant agreed to pay a commission if someone found and brought the property at $26,500, but the plaintiff's testimony was to the effect that the defendant stated his property was for sale and that he would pay the plaintiff the usual and customary commission in case he found a purchaser, and when the plaintiff asked the defendant what his price was he named the figure, $26,500. In other words, there is no evidence showing or tending to show that the defendants agreed to pay the commission was conditioned upon the getting his asking price. Neither is there any evidence in the record [illegible] to show that after the plaintiff [illegible] the defendants in the property, they withdrew the idea of buying it, and that their change of mind at the property was due to the efforts of [illegible] or [illegible].

The defendants also [illegible] attention given by the trial court [illegible] told that it was [illegible] from the [illegible] defendants employed the plaintiff to [illegible] a sale of the property, [illegible] undertook with a diligence and [illegible]

curing cause in bringing the defendant and the buyer together, then the plaintiff would be entitled to recover a commission from the defendant, "regardless of the fact that the defendant concluded the sale." Again, the complaint made of this instruction is that it fails to set forth that the purchaser took the property on the terms agreed upon between the defendant and the plaintiff. We have above stated the reasons why we think that objection is untenable.

The defendant also complains of the action of the trial court in refusing three instructions tendered by the defendant. The first one of these instructions sought to tell the jury that if they believed from the evidence that the defendant sold the property himself "without the help or efforts of the plaintiff," then they should find the issues for the defendant. While, strictly speaking, that instruction stated the law correctly, we are of the opinion the trial court properly refused it in this case, because, under the evidence which was before the jury, it was quite likely to be misleading. In one view of the situation disclosed by the evidence the jury might believe that when the defendant sold the property to Harry Rubin he did it "without the help or efforts of the plaintiff." But that would not be the true situation if the jury further believed, as the plaintiff's evidence tended to show, that the plaintiff was the one who brought the attention of the buyers to the property, and their ultimate purchase of it was due to that fact. Another instruction tendered by the defendant and refused by the court, sought to instruct the jury that the plaintiff could not recover un-

owing cause in bringing his claim at all the lower tribunals, then the plaintiff would be entitled to recover a moderation from the defendant, regardless of the fact that the defendant contributed to it." Again, the particular rule of this instruction is that the jury should find for the purchaser that the property in the [illegible] was [illegible] the defendant at the initiation. [illegible] why we think that objection is unsound.

The defendant also complains of the action of the trial court in refusing three instructions tendered by the defendant. The first one of these instructions sought to tell the jury that if they believed from the evidence that the plaintiff said the property "simply talked about the help or efforts of the [illegible]," then they should find checkmarks for the defendant. While, strictly speaking, that instruction states the law correctly, we are of the opinion the trial court properly refused to [illegible] because, under the evidence which was before the jury, it was quite likely to be misleading. In our view of the attention directed by the evidence, the jury might believe that when the defendant said [illegible] to say that the [illegible] "talking the help or efforts of [illegible]," But that would not be the same statement in the [illegible] further believed, as [illegible] instructed, [illegible] to mean, that the plaintiff was in use the property the efforts of the lessee to [illegible] [illegible] change of it was [illegible] to that [illegible]. Another instruction tendered by the defendant was refused by the court, [illegible] to instruct the jury in the [illegible]

less he had proven by a preponderance of the evidence that he first introduced the purchaser or purchasers of the property in question to the defendant, and that the sale of the property was brought about through the efforts of the plaintiff. That instruction was subject to the same objection as the last one referred to. It contains a correct general statement of the law, but, as applied to the evidence in this record, it would be quite likely to be misleading. It is admitted that the plaintiff did not introduce Harry Rubin personally to the defendant, but if, ashe contends, and as the evidence submitted in his behalf tends to show, he took Mrs. Rubin over to see the property and introduced her to the defendant, and she was there both in her own behalf and that of her husband; and he had stated he would take the property if it was satisfactory to her; and this led to the purchase of the property by him; the plaintiff would be entitled to his commission even though he had not introduced the purchaser, Harry Rubin, personally, to the defendant.

The third instruction tendered by the defendant and refused by the court, was one in which it was sought to have the court tell the jury that preliminary to their being accepted as jurors, they had been examined by counsel for the respective parties as to their qualifications, and in that connection, they had answered the various inquiries made to them and their answers showed that they were duly qualified; and they had been accepted by the parties, to act as jurors, on the basis of their answers, and further, that the answers they had made to the questions asked of them as to their "competency, qualifications, fairness,

lack of prejudice and freedom from passion and sympathy are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the cause. It would be improper for you to disregard the answers that rendered you competent jurors." While the giving of that instruction would have been proper, its refusal by the trial court would not justify disturbing the verdict and judgment appealed from. In view of all the evidence, we are unable to see how the action of the court, with regard to this instruction, could have by any possibility prejudiced the defendant.

For the reasons stated the judgment of the County Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Lack of preparation and freedom from pressure and strain are as binding on you now as they were then and should so remain until you are finally discharged from further consideration of the crime. It is to be regretted that you is discovered the matter that rendered you accessory before." While the giving of such instruction may have been proper, its refusal on the trial court could not justly disturbing a verdict and judgment expressing true. In view of all the evidence, we are unable to see how the action of the court, with regard to this instruction, could have by any possibility prejudiced the defendants.

For the reasons stated the judgment of the county court is affirmed.

AFFIRMED.

BATTLE and CHAMBERS, JJ., concur.

321 - 30074

EASTERN FELT COMPANY,
a corp.,
Appellee,

v.

U. S. AYER,
Appellant.

240 I.A. 670

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO.

Opinion filed Feb. 3, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On April 28, 1924, the plaintiff, the Eastern Felt Company, brought suit in the Municipal Court against the defendant, U. S. Ayer, as endorser of a promissory note for $1,000.00; and, upon a trial, without a jury, recovered a judgment in the sum of $1158.75. This appeal is from that judgment.

The note in question is as follows: "Chicago, March 9, 1923. Twenty four months after date we promise to pay to the order of Eastern Felt Company One Thousand * * * Dollars, at Winchester, Mass. * * * (Signed) Bennett O'Connell Co. U. S. Ayer, Pres." Endorsements on the back of the note are as follows: "U.S. Ayer, Eastern Felt Co., By Thos. J. Donnelly, Treas."

There is no controversy as to the authenticity

881 -- 200PA

EASTERN FELT COMPANY, a corp., Appellee, v. G. E. AYER, Appellant.	ZAPOTLA GYO a local term of the Appellate Court of Illinois.

Opinion filed Feb. 3, 1926.

MR. JUSTICE FARIS delivered the opinion of the court.

On April 20, 1924, the plaintiff, the Eastern Felt Company, brought suit in the municipal court against the defendant, G. E. Ayer, on a promissory note for $1,[illegible]; said, upon a trial, without a jury, recovered a judgment in the sum of $1[illegible].72. This is not in dispute. From that judgment

The note in question is as follows: "Chicago, March 3, 1923. Twenty [illegible] after date we promise to pay to the order of [illegible] Felt Company [illegible] Dollars, at [illegible] Ayer, [illegible] Kenneth O'Connell [illegible] Ayer." [illegible] on the back of the note are as follows: [illegible] Felt Co., By [illegible] Secretary. [illegible]

There is no controversy as to the authenticity

execution, endorsement, and delivery of the note. The contest here is whether the plaintiff complied with the requirements of the law of the State of Massachusetts as to presentment for payment and notice of dishonor, so as to hold the endorser, the defendant; or whether those requirements were legally waived.

It is the theory of the plaintiff that the evidence shows such knowledge and conduct on the part of the defendant that the formal acts of presentment for payment, and formal notice to him of dishonor were unnecessary. The theory of the defendant is, that there was neither proof of presentment nor of notice of dishonor; nor proof of waiver of either.

The evidence for the plaintiff consists of the testimony of Edgar J. Phillips, and certain exhibits. The substance of the testimony of Phillips is as follows: - Early in March, 1922, having received a letter from the plaintiff, his client, he wrote to Bennett-O'Connell Company, of which Ayer was president, and a few days afterwards, the defendant called at the witness's office. At that meeting he told the defendant that the plaintiff had sent him, the witness, about $4,000.00 of trade acceptances upon the Bennett-O'Connell Company for merchandise which were past due, and that the plaintiff, also had sent him a circular that he, the defendant, had sent out to his creditors, suggesting a composition of the creditors of the defendant, the Bennett-O'Connell Company, which involved taking preferred stock in the defendant's company. He told the defendant that the plaintiff was not willing to do that, but had instructed him to commence suit; that the

[illegible] conscious, unnecessary, [illegible] necessary in the act. The contract here is wanting for [illegible] requisite of the law of the state of Massachusetts to prescribed for [illegible] notice of claim [illegible], so as to hold the [illegible], the [illegible] these requirements [illegible] strictly enforced.

It is the theory of the [illegible] that the evidence shows such knowledge and [illegible] on the part of the defendant that the formal notice of presentment for payment, and formal notice of non-payment were unnecessary. The theory of the defendant is, that there was neither proof of presentment nor of notice of dishonor; nor proof of waiver of either.

The [illegible] testimony of [illegible], [illegible] evidence. The substance of the testimony of [illegible] [illegible] early in [illegible], 1[illegible], [illegible] from the [illegible], who claims, he made [illegible] Post-Office Money, [illegible] which [illegible] a president, [illegible] the defendant contended [illegible] authority [illegible] told [illegible] the evidence, [illegible] the Post-Office [illegible] past due, and [illegible] strongly, [illegible] circumstances [illegible] conditions, [illegible] the [illegible] [illegible] said the [illegible] that, [illegible] corroborate [illegible]

defendant told him, the witness, that if he would accept an initial payment of $600.00 in cash, he would give him a series of notes providing for the payment of $500.00 every two months, and the balance to be paid in twenty-four months. The defendant, also, asked the witness to inquire whether the plaintiff would accept the return of certain merchandise. The witness wired the plaintiff, and, upon receiving a reply a few days later, he informed the defendant that the plaintiff would not accept the wheels (the merchandise) but that they would accept the cash and notes with his endorsement," and would cancel the $4,000.00 of trade acceptances. The defendant, said that that was satisfactory to him, and, accordingly, he, the witness, prepared the notes, four or five, in the defendant's presence, and the defendant then made a cash payment of about $600.00. That occurred on March 9, 1922. One of those notes was the note in question and was endorsed by the defendant before it was delivered, and still remains unpaid. The interest on it, up to October 21, 1924, amounts to $158.75. The first note, being for $500.00 fell due in June, 1922, and he, Phillips, called up the defendant almost daily from June 9 to June 30, in regard to its payment, and the defendant finally paid it on June 30. That note bore the endorsement of the defendant on its back. In talking with the defendant between June 9 and June 30, he, the witness, frequently told the defendant that he would have to proceed against him on his endorsement, and the defendant invariably suggested that if he would give him a chance to work out of his difficulties the company would be able to take care of the notes, and, further, requested that he, the witness, would not proceed

defendant told him, the witness, that it [illegible] accept an initial payment of $[illegible] in cash, he [illegible] give him a series of notes running for the period of [illegible] every two months, and the balance [illegible] in twenty-four months. The defendant, also, made [illegible] the plaintiff would accept the return of certain merchandise. The witness told the plaintiff, and, upon receiving a reply a few days later, he informed the defendant that the plaintiff would not accept the chattels (the merchandise) but that they would accept the cash and notes [illegible] the transaction." The court denied the [illegible] motion for a trade acceptance. The reasons, said that was satisfactory to him, and, accordingly, he, the witness, executed the notes, [illegible] in the defendant's [illegible], and [illegible] and then made a cash payment [illegible]. That occurred on March 8, 1924. One of [illegible] was the note in question and was endorsed by the [illegible] before it was delivered, and [illegible] unpaid. [illegible] 21, 1924, amounts to $[illegible]. The [illegible] note, being [illegible] $500, [illegible] fell due in June, 1928, and he, [illegible], called up the defendant [illegible] to make good [illegible]. In regard to the payment, and the [illegible] on June 30. That was before the [illegible] - [illegible] on the back. In talking with the [illegible] June 9 and June 30, he, the witness, frequently told the defendant that he would have to proceed against him on the endorsement, and the defendant [illegible] he would give him a chance to work [illegible] the difficulties the company would be able to take [illegible]. At [illegible] further, requested that he, [illegible] the witness, [illegible]

against him.

The next note became due September 9, and was taken up and paid. The next note became due December 9, and he, Phillips, called up the defendant several times, and told him he would have to bring suit against him. The defendant kept promising from day to day that he would send a check. On December 27, 1922, the witness started suit, in the Municipal Court, against the defendant on that note. He called up the defendant and told him that he had begun suit. On January 5, 1923, the defendant told him, the witness, that he was working out a plan to pay his debts, and said that he would send a check by special delivery to him that day, and a check was, accordingly, sent and received.

The fourth note was given to counsel for the defendant, and was not produced. Concerning the payment of that note, he, the witness, had a conversation with the defendant, or with his counsel. On December 9, the defendant called on him, the witness, and said that the reason the Bennett-O'Connell Company could not pay those notes was because they had so many outstanding accounts themselves, and asked him, the witness, if he would be willing to take some of the accounts in payment of the notes. He told the defendant that he would not, but that he would try to collect them and credit on the notes anything that might be collected. The defendant gave to him, the witness, two accounts, each for $500.00, and directed him to start suit for them. Both those accounts were collected, one for the benefit of the Bennett-O'Connell Company, and the other for the defendant.

against him.

The next note came due September 3, and was taken up and paid. The next note became due December 8, and he, Phillips, called up the president several times, and told him he would have to bring suit against him.

The president kept counseling time by saying that he would send a check. On December 27, 1924, the Liberty National, in the Langford Court, obtained judgment on that note. He quite frankly admitted that he had to pay the note before, and said that he had a hard time to raise money to do this that day, and a check was, accordingly, sent and received.

The fourth note was given to secure for the defendant, and was not produced. Assuming the payment of that note, he, the plaintiff, has proceeded with the defendant, as with all others. On December 8, the defendant called on him, the plaintiff, [illegible] Commercial [illegible] and [illegible] that he was [illegible] of the accounts in payment of the notes. [illegible] and that he would [illegible], but that [illegible] and credit on [illegible] the defendant gave to him, the plaintiff. [illegible] for [illegible], and directed him to [illegible] those accounts [illegible], and for the benefit of the Commercial Company, and [illegible] statement.

The latter was for $500.00, which he, the witness, turned over to the defendant. After calling up the defendant practically every day for the payment of the fourth note, and beginning suit on it, it was paid in the latter part of 1923.

Apparently, some time shortly after March 31,1923, he, the witness, received a letter from the defendant (the letter is not dated), signed U. S. Ayer, Receiver of the Bennett O'Connell Co. That letter recited that on March 31, 1923, the defendant had been appointed Ancillary Receiver of the Bennett-O'Connell Company and the Ayer -O'Connell Manufacturing Company, on a bill filed in the United States District Court in the District of Connecticut. That letter contained the following: "You will please make your proof of claim to me by a verified statement of your claim, which may be filed with me at the address given below. "Upon receipt of the letter, he (the witness) called up the defendant, and expressed his surprise at receiving it in view of the fact that two days before he had sent in the proceeds of the Hammond Brass Company's payment, at the defendant's request, and at the same time he was indebted to his, the witness's client, on the past due note. He told him, further, that he intended to look to him, the defendant, personally, for the payment of the note. He received, the time is not stated, a notice dated December 12, 1923, signed by the defendant as Receiver, informing him that all those having claims against the Bennett-O'Connell Company must present them, duly verified, to the defendant, the Receiver, on or before December 31, 1923; otherwise they would be barred from par-

ticipation in the assets of the Company. In response to that communication, he, the witness, prepared a claim and mailed it to the defendant. On March 8, 1924, which was Saturday, he wrote to the Bennett-O'Connell Company, at its address in Chicago, notifying that Company that its note (the note in question) to the Eastern Felt Company, the plaintiff, for $1,000.00 plus interest, would become due and payable at his, the witness's office, on March 9, and requesting that it be taken care of without fail. On Monday March 10, he telephoned the defendant and asked him if he had received the letter, and whether or not he was sending a check, and the defendant said he had not received the letter; that he then told the defendant that the final note for $1,000.00 - the one here in question - became due the day before on Sunday, and that he would have to have a check on it immediately. The defendant said that the concern was in bankruptcy or receivership, and "asked him to hold off and give him a chance, so that the company could make payment instead of going after him personally." He, the witness, told the defendant that that could not be done; that the Company would not have taken the note unendorsed. The defendant said he would take the matter up with his counsel, and get in touch with him, the witness, in a day or so. Shortly afterwards, he, the witness, instituted the present suit on the note in question. Sometime in March or April, 1923, the defendant told him the receivership was simply a friendly matter; that it did not mean that the Company would not pay its bills, and that the claims should all be presented to him as Receiver. He, the witness, told the defendant that he had all the notes here, and that they would have to be paid here; that the defendant said, "All

tigation in the amount of his damages. In response to that communication, he, the witness, prepared a sight draft and mailed it to the defendant. On March 8, 1924, which was Saturday, he wrote to the Barnett-O'Donnell Company, at its address in Del Rey, notifying that company of the note (the note in question) to the Eastern Part Company, the plaintiff, for $1,000.00 plus interest, which became due and payable at his, the witness's office, on March 8, and requesting that it be kept there or that it not fail. On Monday March 10, he talked over the telephone with defendant's wife if he had received the letter, and whether or not he was sending a check, and the defendant said he had not received the letter; that he then told her that that the final note for $1,000.00 - the one that is involved - became due the day before on Sunday, and that he was going to make a check on it immediately. The defendant said that the concern was in debtor's by or reasonably, and failed to hold off and give him a chance, so that the company could make payment instead of going after him personally." He, the witness, told the defendant that that could not be done; that the Company would not withdraw the note under-consideration. The defendant then [illegible] with this proposal, [illegible] in a day or so. Shortly thereafter, he, the witness, visited the premises with the note in question. Sometime in March or April, 1924, the defendant [illegible] this company owed only a trifling matter; that it was not in a that the company would not pay [illegible] should all be discussed in [illegible] assistant. He, the witness, told the defendant that [illegible] and [illegible] said, "all

right, to present the notes to him as receiver in the form of a verified claim." "And along when the last note became due I spoke to him about paying it and he told me it was on file over there, I told him he had to pay my client; I told him I had put my client off, as he had requested, for three or four months before that and that he had not paid anything on that note, that we could not let the matter drag along that way. I had a copy of the note being sued upon here, and mailed it to him in December, 1923. And we had received nothing on it, and that as much as I disliked to do so, I would have to start suit against him." The defendant was the executive officer of the defendant's business, the Bennett-O'Connell Company. The note in question which is the subject of this suit, was sent to him, the witness, a year before its maturity, at the time the plaintiff received notice of a receivership. He told the defendant he had the note here in Chicago. The three checks given in payment of the first three notes, were drawn by the Bennett-O'Connell Company, to the order of the plaintiff; the fourth, being for $167.11, was payable to the plaintiff's attorneys, was dated August 18, 1923, and signed by the defendant as Receiver.

The plaintiff called the defendant Ayer, under Section 33 of the Municipal Court Act. His testimony is substantially as follows:- He was President of the Bennett-O'Connell Company, and is now the receiver, being appointed March 29, 1923. He did not know who was the moving party in creating the receivership; that it started spontaneously to protect the creditors and stockholders, and whether it

was a friendly receivership, he was not able to state. There were two receiverships, one in the east and one here, and he was made receiver in both cases. As he understood it, the receivership was resisted. The letter of March 8, (record recites March 29) came into the office of the company, but he would not see it unless it were important. The original letter did not come to his notice or knowledge. He had Mintz, the auditor, turn over to Phillips some claims, and Mintz received a remittance on some collections. The notice of December 12, 1923, to file claims with him as receiver was sent out through his direction, and a claim from the plaintiff came in, but personally he did not see it, though, he testified, "I believe I have seen the claim of the Eastern Felt Company in connection with the receivership." The note in question was not with the claim. The note bears his signature. He signed it on behalf of the Bennett-O'Connell Company, as president, and signed it as endorser. When asked if a copy of the note was filed with him as receiver, he answered that he could not say whether it was or not. He was appointed receiver on March 29, 1923. After he was appointed receiver, he alone had authority to sign checks. If there were any payments made on the notes referred to after March 29, 1923, they were paid through the company by him as receiver. He knew that Phillips had several notes, as attorney for the Eastern Felt Company, and that he was demanding payment on them as they fell due from time to time. Phillips talked to him about the matter only once, but talked chiefly with Nicholson, the Treasurer. Phillips did not talk with him, Ayer, after he was appointed receiver.

was a friendly [illegible], however, he was [illegible] to at [illegible].
There was the [illegible], as in [illegible] one
here, and he was made [illegible] to [illegible] cases. [illegible]
about it, the [illegible] was [illegible]. The [illegible] of
March 6, (George [illegible] March 20) was [illegible] of the
company, but he did not see it unless it was important.
The original letter did not [illegible] the [illegible] or [illegible]-
edge. He had [illegible], the [illegible], then over to [illegible]
some [illegible], [illegible] [illegible] or some [illegible]-
tions. The [illegible] of December 12, 1905, in his [illegible] with
his as receiver was sent out [illegible] direction, and a
claim from the [illegible] [illegible], [illegible] he did
not see it, though, he testified, "I [illegible] [illegible] the
claim of the Eastern [illegible] [illegible] with the
receivership." The [illegible] in [illegible]
The note bears his signature. [illegible] of the
Bennett-Dannell [illegible], is genuine, he signed it as
endorser. When taken to a [illegible] the note was filed with
his as receiver, it appeared that [illegible] was [illegible]
it was on [illegible]. He was associated [illegible] on [illegible],
after he was [illegible] secretary, [illegible] to
sign checks. It was [illegible] [illegible] the note
referred to after [illegible] 12, 1906, [illegible] the
company by his as receiver. He was [illegible] [illegible] several
notes, is [illegible] the [illegible], and [illegible]
to the [illegible] [illegible] the [illegible] [illegible]
to time. [illegible] [illegible] [illegible],
but talked usually with [illegible], the [illegible]. Bennett
did not talk with him, [illegible], after he was [illegible] receiver,

He did not know what notes were still outstanding when he was appointed receiver, although he knew that the $1,000 note in question had not been paid by Bennett-O'Connell Company. He did not know that before it fell due. On March 11, 1924, a letter signed by the defendant as receiver for the Company and containing the initials U.S.A. was sent to Phillips, law firm, and contained the following:- "Your letter of the 8th inst. just received today, beg to advise that I am forwarding same to my attorneys " * *", and will you please communicate with them relative to same." He knew that the claim of the plaintiff on the $1,000 note was filed by him as receiver in the Federal Court.

His evidence when he testified in his own behalf is substantially as follows: - The merchandise which the Bennett-O'Connell Company bought, and which was the consideration for the note in question, consisted of felt wheels. Since he, the defendant, was appointed receiver, he has been conducting the business of Bennett-O'Connell buying and selling goods, and paying for them. It has conducted a larger volume of business since he became receiver than it did before his appointment. He denied that Phillips telephoned him in June, 1923, that a note was due on June 9th, or that Phillips talked with him almost every day from June 9 to June 30 about payment of a note; denied that on or about December 19, 1923, in a telephone conversation with Phillips, thelatter said he would have to bring suit against him; denied that on January 5, 1923, he told Phillips that he was working out a plan to pay all his debts, and for him to give the company a chance and not go for him; denied that on Jan-

He did not know what notes [illegible] when he was appointed receiver, although he [illegible] note [illegible] in question had [illegible] by the Bennett-O'Connell agency. He did not know that [illegible] February 11, 1927, a letter signed by the [illegible] company and containing the initials O.S.[illegible], was sent to Phillips, law firm, and contained the following: "Your letter of the 8th inst. just received today, and in answer would say that [illegible] forwarding same to [illegible] attorneys [illegible] consult with them relative to same." [illegible] knew [illegible] of the plaintiff on the $1,000 note was filed by him as receiver in the Federal court.

The evidence when he testified in his own behalf is substantially as follows: -- The transactions which the Bennett-O'Connell company handled, and which was the consideration for the note in question, consisted of felt [illegible], [illegible], etc., [illegible] representative, he [illegible] conducting the business [illegible] O'Connell buying and selling goods, [illegible] for them. It was accepted [illegible] volume [illegible] became receiver [illegible] denied that Phillips telephoned [illegible], 1926, [illegible] note was [illegible] almost every day from [illegible] a note; denied that [illegible] telephone conversation with Phillips, [illegible] would [illegible]; January 1, 1926, [illegible]

uary 5, 1923, he called Phillips up and said he would send him a check by special delivery that day. That conversation, he intimated, must have taken place between Phillips and Nicholson, the treasurer of the company; that Nicholson or Mintz were handling the accounts. He had nothing to do with the bills payable at all during the whole year of 1923, until after his appointment as receiver. He denied that Phillips, between March 9 and the end of March, 1923, called him up every day for a check; denied a conversation with Phillips in regard to certain collections. He had a conversation with Phillips in which he told him they had some accounts and he would have Mintz take the matter up with him, Phillips, but that nothing was said at that time to the effect that theproceeds of those accounts might be applied on the plaintiff's note. He denied that Phillips called him up on the telephone and expressed his surprise at receiving a notice of the receivership, and denied that shortly after the sending of the notice of the receivership, Phillips told him that he intended to look to him personally for the payment of the note, on his endorsement. He had no conversation and no communication with Phillips after he was appointed receiver. The company at the time of the receivership had assets equal to twice its liabilities. No distribution or dividends have been made by him as receiver of the company, and no general creditors have been paid their accounts. The liability of the company at the time he was appointed receiver, amounted to about $29,000.00. Certain so-called inter-accounts have been paid amounting to

certain so-called inter-counties have been, and nothing to
the contrary appears, entirely innocent. The liability of the company to
pay the operating receiver, accrued in June 1920, was
quite short occurring. The liability of the company to
distribution or dividends been made up to the
receiver of the company, and no general creditors have been
paid since occurring. The liability of the company to the
receiver was operated receiver, accrued in June 1920, was
no conversation and no communication with Phillips prior to
was appointed receiver. The receipt of the time of the
receivership had never arrived to raise the liability.
Phillips said he was interested to hear in the receivership
for the payment of the note, on his endorsement. He had
shortly after the sending of the notice of the receivership,
called on the plaintiffs here. He denied that Phillips called
up on the telephone and requested an adjournment of the
motion of the receivership. He denied that
Phillips, but that nothing was said at that time to the
effect that arrangements of some sort might be
made by the plaintiffs here. He denied that Phillips called
effect that arrangements of some sort might be made
up on the telephone and requested an adjournment of the
motion of the receivership. He denied that
Phillips in which he told the writer had some assurance
and he would have plenty time the matter to deal with.
Phillips, but that nothing was said at that time to the
effect that arrangements of some sort might be made
on the plaintiffs here. He denied that Phillips called
up on the telephone and requested an adjournment of the
motion of the receivership. He denied that
shortly after the sending of the notice of the receivership,
Phillips told him that he intended to hand in his resignation
for the payment of the note, on his endorsement. He had
no conversation and no communication with Phillips prior to
was appointed receiver. The receipt of the time of the
receivership had never arrived to raise the liability.
to distribution or dividends been made up to the
receiver of the company, and no general creditors have been
paid since occurring. The liability of the company to the
receiver was operated receiver, accrued in June 1920, was
certain so-called inter-counties have been, and nothing to

about $3,000.00 or $4,000.00. A check for $167.11, dated August 18, 1923, payable to Phillips, Mack & O'Bryan, and signed U.S.A. as receiver, was given because the receiver desired to purchase more felt wheels from the plaintiff, and the plaintiff said they would not ship any wheels C.O.D. until there was a settlement of accounts, and in order to get the wheels, he, the defendant, got an order for settling the account. He denied having any knowledge that he had been sued personally in any suits brought by the plaintiff. He was president of the Bennett-O'Connell Company, but not the general manager. He devoted only a small part of his time to the business of that company. The other business he had was the Ayer-O'Connell Company. That when the receivership was brought about, those two companies were joined in one suit.

The question arises, as we have said, whether the plaintiff complied with the law as to presentment or notice, or if not, whether the evidence shows a waiver of those requirements. The note was payable at Winchester, Mass., and so, as to presentment for payment, notice of dishonor, and waiver, the law of that state applies.

In George v. Haas, 311 Ill. 388, the court said:

> "Parties are presumed to contract with reference to the law of the State where their contract is to be performed, and to be governed by such law rather than the law of the State where the contract was entered into. This rule has been declared and applied in practically every variety of contract, including bills of exchange, promissory notes, and checks drawn in another State payable in this."

about $5,000.00 or $6,000.00. A check for $167.11, dated August 18, 1952, payable to Phillips, and d O'Bryan, and signed U.S.A. to receivers, was given because the receivers desired to wrapdown more fully apart from the plaintiff, and the plaintiff said they would not sign any checks C.O.D. until there was a settlement of accounts, and in order to get the check, he, the defendant, got in order for settling the accounts. He denied having any knowledge that he had been sued personally in any suits brought by the plaintiff. He was president of the Dunnett-O'Donnell company, but not the general manager. He devoted only a small part of his time to the business of that company. The other [illegible] he had was the Dyer-O'Donnell company. Just when the company officially was brought about, these two companies were joined in one suit.

The principal issues, as we have said, whether the plaintiff complied with the law in the arrangement or notice, or if not, whether the defendant waive a notice of those requirements. The note was negotiable at Lindsay, Ont., and he, the defendant [illegible], notice of dishonor, and waiver, the law of that state was the

In Dunne v. Dunn, [illegible] 111 [illegible], the court said:

> "Further the contract in question with reference to a lot of the [illegible] their business is to be performed, and to be governed by such law rather than the law of the State where the contract was entered into. This is the [illegible] has been declared and so laid in [illegible] every variety of contract, including sales of exchange, promissory notes, and checks issue in such or [illegible] state [illegible] in [illegible]."

Section 106, Chap. 107 of the General Laws of Massachusetts, 1921, provides as follows:

> "The instrument is dishonored by non-payment when * * * presentment is excused and the instrument is overdue and unpaid."

Section 133 provides:

> "Notice of dishonor may be waived, either before the time of giving notice has arrived, or after the omission to give notice, and the waiver may be express or implied."

Section 138 provides:

> "Notice of dishonor is not required to be given to an endorser * * * where the endorser is the person to whom the instrument is presented for payment."

That law is practically identical with the law of this State. Chap. 98 Negotiable Instruments. Such being the law, is the contention of the defendant sound?

In view of what the evidence shows concerning the protracted business relations between the parties; the giving of the trade acceptances, the transmutation of them into a series of notes, and the giving of a check; the arrangement made through the defendant, that these notes, for the convenience of the company of which the defendant was president, should come due serially, months apart; that none of those, save one, was paid, but after repeated requests by the plaintiff, or one of its attorneys, that the company went into the hands of the defendant, its

Section 108, Ch. 107 of the General Law of Massachusetts, 1921, provides as follows:

> "The assessment is discovered by commitment when " " presentment is returned and the instrument is overdue and unpaid."

Section 122 provides:

> "Notice of dishonor may be given, either before the time of giving notice has arrived, or after the omission to give notice, and the waiver may be express or implied."

Section 123 provides:

> "Notice of dishonor is not required to be given to an endorser " " " where it appears in his presence or when the instrument is presented for payment."

Thus it is manifestly intended that the law of this State, Chap. 98 Negotiable Instruments, much being the law, is the guarantee of the transfer and

sound.

In view of what has been [illegible] recent, the overstated business and [illegible] the giving of the trade acceptance, the [illegible] of [illegible] life [illegible] series of notes, [illegible] of a [illegible] arrangement [illegible] for the convenience [illegible] was invented, [illegible] that none of those, some one, we [illegible] responsible by the [illegible], [illegible] the company [illegible], [illegible]

president, as a receiver before it, the note in question, was due; that at the time it went into his hands as receiver, he knew the note was unpaid; that the defendant as receiver, on or aboutnMarch 31, 1923, before the note was due, sent word to the plaintiff to make proof and file its claim against the company with him; that he then called up the defendant and told him he intended to look to him personally; that on December 12, 1923, he received from the defendant as Receiver a notice signed by the latter informing him that all those having claims against the Company must present them duly verified to him, the Receiver, on or before December 31, 1923, or otherwise they would be barred from participation in the assets of the company; that the plaintiff, through its attorney, prepared a claim and mailed it to the defendant; that on March 8, 1924, which was Saturday, the attorney for the plaintiff sent a letter to the company at its address in Chicago, notifying it that the note in question would become due and payable at the attorney's office on March 9, and requesting that it be taken care of without fail; that on Monday, March 10, he telephoned to the defendant and asked him if he had received the letter, and whether or not he was sending a check, and the defendant answered that he had not received the letter; that he then told the defendant that the note, the one here in question, became due the day before, on Sunday, and that a check would have to be given for it immediately; that the defendant said that the concern was in bankruptcy, or in a receivership, and was being worked out; that he asked him "again to hold

off and give him a chance so that the company could make payment, instead of going after him personally;" that the plaintiff's attorney told the defendant that the plaintiff had written to the latter, (the plaintiff's attorney) half a dozen times and "he knew where he stood on that, that the Eastern Felt Company would not stand for it; that they would not in the first place have taken the notes of the company unendorsed, and that they took them only with the endorsement;" that the defendant in response said he would take the matter up with his attorney; that on the following day, the plaintiff's attorney received a letter from the defendant, signed by him as Receiver, acknowledging the receipt of the plaintiff's attorney's letter of the 8th inst., and advising the latter that he was forwarding it to his attorney and requesting plaintiff's attorney to communicate with the defendant's attorney relative thereto, we are of the opinion that the position of the defendant is not tenable.

It is true that the defendant denied many of the things testified to by Phillips, but in view of the judgment of the trial judge and the propositions of law held by him, we assume he considered the testimony of Phillips as worthy of belief; and we find nothing in the record which justifies any other conclusion.

The defendant was the president and receiver, and as an officer of the court had the custody of all the property of the company, and he alone had the right and authority under the court's orders to make payments out of the company's assets, and, further, at the time the note

matured, and he had been informed of that fact, he requested the plaintiff's attorney to hold off and give him, personally, a chance; and that accommodation was given him. His office and position as to the company after the receivership was not limited, as was that of the treasurer in the case of Maynard Trust Co. v. Furbush, 243 Mass. 190. In that case the evidence showed that the treasurer was not active in the management of the corporation. In the instant case, not only was the defendant, in reality, the active manager, but as receiver he knew of the obligation, and that it was due, and, further, and more important, that it could not be paid but by him.

Our attention is directed to Phipps v. Harding, 70 Fed. 477. In that case the court said, "that insolvency is no excuse for failure of notice of dishonor." Here the evidence shows that the plaintiff's claim is not based upon the theory that the mere fact that the company was in the hands of a receiver, dispensed with presentment and notice. The company may or may not have been insolvent; that is unimportant. In our view of the evidence, which we have set forth above, there was what might be called the equivalent of presentment and notice, and certainly, at least, that which was tantamount to an overt intentional waiver. Tucker Mfg. Co. v. Fairbanks, et al, 98 Mass. 101; Corner v. Pratt, 138 Mass. 446.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

[illegible] and he had been [illegible] or [illegible], so [illegible] overturned the [illegible], [illegible] [illegible] [illegible], personally, a [illegible], was that [illegible] was given him. His [illegible] and [illegible] [illegible] after the [illegible] was not [illegible], [illegible] [illegible] the treasurer in [illegible] of Atlanta Title Co. v. [illegible], 342 Mass. 180. In that case the [illegible] stated that the treasurer was not acting in the [illegible] of the corporation. In the instant case, not only was the [illegible], in reality, the active [illegible], but [illegible] of the obligation, and that [illegible], and more important, that it could [illegible] be paid but by him.

Our attention is directed to Bailey v. Manning, 70 Tex. 477. In this case the [illegible] said, "that insolvency is no excuse for failure to [illegible] of dishonor." There the evidence [illegible] [illegible] upon the theory that [illegible] was in the [illegible] of a creditor, [illegible] notice. The [illegible] that [illegible] insolvent; that is unimportant. In [illegible] of [illegible], which we do not [illegible] here, [illegible] [illegible] of [illegible], but [illegible], it leaves, the [illegible] to an [illegible] waive. Under [illegible] v. [illegible], [illegible], 32 [illegible], 113; Garner v. [illegible], 128 [illegible], [illegible].

[illegible] no [illegible] in the [illegible], the [illegible] [illegible] to affirmed.

[illegible]

Jackson, J., [illegible] [illegible], [illegible].

30 - 30263

THE PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

v.

GEORGE FAABORG,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 670

Opinion filed Feb. 3, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On January 12, 1925, an information, upon leave being obtained, was filed in the Municipal Court by Charles H. Bell, charging that the defendant, George Faaborg, on January 11, 1925, and on other days - being at that time a married man having a lawful wife then living - and Bernice Record, a single woman, unlawfully and wrongfully did live together in an open state of adultery and fornication, in violation of Section 11, Paragraph 23 of Chapter 38, Cahill's Revised Statutes of 1921. On the same day, the defendant appeared in person and waived a jury trial. His bond was fixed at $1,000.00, and the cause set for trial on January 21, 1925. The defendant pleaded not guilty, and on the date set, there was a trial before the court without a jury. On January 23, 1925, the court found the defendant guilty, as charged, and sentenced him to confinement in the House of Correction for the term of fifteen days. This writ of error is prosecuted to reverse that judgment.

No. 32253

THE HON. LA [illegible] LA [illegible],

Petitioner in error,

v.

[illegible]

Defendant in error.

Petition in error to the Court of Appeals of the State of Ohio.

Opinion Filed Feb. 2, 1926.

Mr. [illegible] [illegible] a motion to dismiss writ of error.

On January 12, 1926, a information, [illegible] being obtained, was filed in [illegible] by Charles C. Noll, charging [illegible] Frances, on January 11, 1926, [illegible] at that time a certain [illegible] Living - and another Second, [illegible] [illegible] arrangement [illegible] adultery and fornication, in violation of Paragraph 4a of Chapter 3a, Division [illegible] of 1921. On the same day, the [illegible] appeared in person and waived a jury trial. [illegible] Gilmore, and the cause set for trial [illegible] Line. The [illegible] [illegible] date set, there was a call before the court [illegible] a jury. On January 22, 1926, the [illegible] [illegible] guilty, [illegible] in the house of Correction for the term of [illegible] year. This writ of error is prosecuted to reverse that judgment.

It is contended for the defendant (1) that the evidence did not show that the alleged crime occurred in the City of Chicago, County of Cook, and State of Illinois; (2) that the evidence failed to prove the crime of adultery; (3) that the evidence failed to prove that the defendant was a married man; and (4) that the trial judge erred in permitting Charlotte Faaborg, wife of George Faaborg, to testify.

The evidence consists of the testimony of Lydia R. McIlvoy, who managed a 67 apartment hotel, or rooming house, at 6351 Woodlawn Avenue, Chicago; Bell and O'Connor, two police officers who arrested the defendant; Weaver, father of the defendant's wife; Charlotte Faaborg, the defendant's wife, and Bernice Record, with whom it is claimed that the defendant lived in a state of adultery.

Weaver testified that his daughter Lottie and the defendant were married about eight years ago, at Cedar Rapids, Iowa, and that he was present and saw the marriage ceremony performed at his home by a preacher; that he saw the marriage license, and he saw the minister make out the certificate. The evidence of Charlotte Faaborg is that she and the defendant were married in August, 1916, in Cedar Rapids, Iowa, at her parents' home; that she knew Bernice Record for about two and a half years at Cedar Rapids, Iowa, and saw her frequently; that she saw her in company with her, the witness's husband a number of times; saw her in the drug store which was kept

It is contended for the plaintiff that (1) that the evidence did not show that the alleged crime occurred in the City of Chicago, County of Cook, and State of Illinois; (2) that the evidence failed to prove the crime of adultery; (3) that the evidence failed to prove that the defendant was a married man; and (4) that the trial judge erred in permitting character witnesses, wife of George Hanford, to testify.

The evidence consists of the testimony of Lydia P. Dailey, who managed a "pleasure hotel," a rooming house, at 6341 Cottage Grove, Chicago; Lil and O'Donnor, two police officers who arrested the defendant; Hanford, father of the defendant's wife, testifying in behalf of the defendant's wife, her character witness; and Ida Lee, a singer who lived in a state of adultery.

Hanford testified that [illegible] the defendant [illegible] Chicago, [illegible] marriage ceremony performed by a justice of the peace; that he saw the marriage license; that he saw the witness make out the application. The witness testified in Hanford's favor that the defendant [illegible] August, 1918, in Cedar Rapids, Iowa, [illegible] that she lived [illegible] years at Cedar Rapids, Iowa, [illegible] that she was not in employ at [illegible], the defendant, [illegible] number of times, [illegible]

by her, the witness's husband; saw them go into the back room of the store before and after working hours; that she saw them together in Chicago, in the store where her husband worked; that she saw her at 4501 Malden avenue, in Chicago and that on that occasion she talked with Bernice Record, and the latter told her that she had a lot of correspondence with the defendant, and showed her, the witness, the letters; that Bernice Record said she, the witness, could have all the letters if she wanted them, and handed them to her. The evidence of the witness Lydia R. McIlvey, who managed the rooming house or hotel, is to the following effect; that on Sunday, January 4, 1925, the defendant and Bernice Record came to the hotel and asked for a room; that she showed them some rooms, and they finally selected Room 21, on the second floor in the rear; that the woman said that the defendant was working nights and he had to have a quiet room in the day; that the room was selected by both of them; that the defendant paid her $5.00; that the rent of the room was about $8.00 a week; that they did not stay there on that Sunday; that the woman came back on Wednesday and paid $3.00, the balance of the rent, and she, the witness, gave her a receipt, presuming at the time that she and the defendant were husband and wife; that she did not see the defendant again until Friday morning, when he and the woman, between 9:30 and 10 o'clock, went out of the hotel together, and after that she did not see him again until about two o'clock A.M. on January 12, when they were both arrested; that she did not see the woman after she paid

by her, the witness's husband, was then go into the back room of the store twice and later testing testify that she saw them together in Chicago, in the store where her husband worked, that she saw her at 6941 Indian Avenue, in Chicago and that on that occasion she talked with Benzine Brooks, and the latter told her that she had a lot of correspondence with the defendant, and showed her the letters, she testified that Brooks moved into the kitchen, would have all the letters in her possession then, and burned them in her [illegible] of the witness Lydia B. Walker, who managed the rooming house or hotel, is to the following effect: that in January, January 4, 1929, the defendant and Benzine Brooks came to the hotel and asked for a room; that she showed them some rooms, and they finally selected room 21, on the second floor in the rear; that her testimony was working night's and he had to have a quiet room in the day; that the room was occupied by both of them; that the defendant paid her money; that the rent of the room was about $8.00 a week; that they did not stay in on that money; that the women came back on Wednesday and paid $8.00, the balance of the rent, and said, "Lydia, give us a receipt, presenting at the time the women the dollar and were handed her right back the receipt and the defendant again said, "Lydia, something, then [illegible] means, between 9:00 and 10 o'clock, each day of the week together, and after 9:00 [illegible] about two o'clock A.M. on January 12, when they [illegible] strangers; that she did not see the women after the [illegible]

$3.00 on Wednesday night, until the next Friday morning.

The evidence of Hall, sergeant of police, is to following effect: - that about 10:30 of the evening of January 11, 1925, he was given a warrant, based on a complaint made by Mrs. Faaborg, and later that night, about 12:35 A.M., after waiting across the street from 6351 Woodlawn avenue for sometime, he saw the defendant and Bernice Record enter the hotel; that after waiting until 1:40 Monday morning, he went over to the building, and after making inquiries of Mrs. McIlvoy, went up to the defendant's room on the second floor; that he, together with the other officer, O'Connor, went up to the room in question, rapped on the door, and when it was opened, he went in with the officer, O'Connor, and Mrs. Faaborg; that when he went into the room, the defendant was in his pajamas and Bernice Record was in bed; that he told them to get their clothes on, and that he had a warrant for them and that he was going to take them to the Woodlawn Police Station; that they dressed and were taken over to the station; that he asked them if they were married, and they said, no; that he asked the defendant if the woman was his wife, and he said, no; that at the time, Bernice Record was there, and she did not say anything different; that she said "she and Mrs. Faaborg had enough by this time, and she ought to quit;" that he asked the defendant, "why he hadn't got a divorce, and he said his wife would not give it to him;" that he had a conversation with Bernice Record; that he asked her if it was not unladylike to take another woman's husband away from her

$5.00 on Wednesday night, until the next Friday morning.

The evidence of Bell, sergeant of police, is to following effect: - that about 12:30 of the evening of January 11, 1921, he was given a warrant, based on a complaint made by Rae, Taylor, and later that night, about 12:35 A.M., after waiting across the street from 6351 Woodlawn avenue for something, because the defendant and Darnie passed under the hotel; that after waiting until 1:00 Sunday morning, he went over to the building, and after making inquiries of Mrs. Sellers, went up to the defendant's room on the second floor; that he, together with the other officer, O'Connor, went up to the room in question, rapped on the door, and when it was opened, he went in with the officer, O'Connor, and Mrs. Taylor; that when he went into the room, the defendant was in his pyjamas and Darnie Sewert was in bed; that he told them to put their clothes on, and that he had a warrant for them and that he was going to take them to the Woodlawn police station; that they dressed and were taken over to the station; that he asked them if they were married, and they said,no; that he asked the defendant if the woman was his wife, and he said, no; that it was time, Darnie Sewert was there, and she did not say anything different; that one said "wife and" the Sewert was enough by this time, the one must to court; that he taken the defendant, "why he hasn't got a divorce, and he said his wife would not give it to him;" that he had a conversation with Darnie Sewert; that he asked her if it was unlawfulle to take another woman's husband away from her

and live with him as man and wife, and she said, "If you love a man you will do anything for him."

The record shows that it was agreed between counsel that the testimony of O'Connor, a police officer, would be the same as that of Sergeant Ball.

The evidence of Bernice Record is to the following effect:- That she lived at 4539 Racine avenue, Chicago; that she never lived with the defendant as husband and wife; that she knew him for about two and a half years, and knew him in the State of Iowa; that she is by profession a stenographer and a dancing teacher; that on January 4, she accompanied the defendant to 6351 Woodlawn avenue, and there saw Mrs. McIlvoy, the manager of the rooming house, or hotel; that the defendant did all the talking; that she did not tell the manager that her husband wanted a quiet place to sleep, nor did she introduce herself as the wife of the defendant; that she went there on Wednesday afternoon and paid $3.00 to the manager, and got a receipt, upon her request, made out to the defendant; that she had no further conversation with the manager; that she did not go there that night and occupy the room with the defendant; that she left the premises about eleven o'clock on Friday morning with the defendant; that on Monday morning, about 12:45 A.M. she met the defendant at the 47th street "L" station; that she had been teaching dancing at the National Dancing Academy, at 431 South Wabash Avenue; that she had a small bag with her and things that she used for evening dancing; that she stayed that night at the defendant's room, where the police arrested her; that she neverlived with the defendant prior to that time, and had

and live with him as his [illegible] wife, [illegible] she said, "If you love a man you will do anything for him."

The record shows that [illegible] that the testimony of [illegible], would be the same as that of [illegible].

The [illegible] to the following effect: That she lived at [illegible] Avenue, [illegible]; that she never lived with the defendant as [illegible]; that she [illegible] party, and [illegible] him in the [illegible]; that [illegible] up [illegible] a stenographer and a [illegible]; that [illegible] accompanied the defendant to [illegible] Avenue, [illegible] Mrs. Gilbert, [illegible]; that the defendant [illegible] the manager [illegible]; nor did she [illegible]; that she went there [illegible] to the manager, [illegible] out to the [illegible] with the manager; that [illegible] County [illegible] about eleven o'clock [illegible]; that on [illegible] morning, [illegible] 12:15 A.M. [illegible] and in the [illegible] Dancing at the [illegible] Tirney; that she [illegible] she used [illegible] the [illegible] never lived with [illegible]

never held herself out to be the wife of the defendant; that she did not tell the police officer that the defendant was her husband, nor did she or the defendant sign her name on the register of the hotel; that on the morning of January 8, she went to the hotel to meet the defendant, and did so, and walked out of the hotel with him.

(1) The evidence sufficiently shows that the alleged illegal acts were committed in Chicago, Cook County, Illinois. The information alleged it; the police sergeant testified that he lived in Chicago and was a sergeant of police of the Fifth District, and was given a warrant for a violation of the Chicago Code, which he served at 6351 Woodlawn avenue by arresting the defendant; the case was tried before a Judge of the Municipal Court of Chicago. From what the record contains, we are of the opinion that the venue was sufficiently proven. Langdon v. People, 133 Ill. 382; People v. McIntosh, 242 Ill. 603; Weinberg v. People, 208 Ill. 15.

(2) Did the evidence sufficiently show that the defendant and Bernice Record, a single woman, lived together in an open state of adultery and fornication, in violation of Section 11? We think it did. The testimony of Lydia R. McIlvoy, who managed the rooming house, or hotel, together with that of the police officers, seems to demonstrate conclusively that the crime charged was committed. On January 4, 1925, the defendant and Bernice Record went to the hotel in question and asked for a room. They were shown several rooms, and finally selected Room 21, on the second floor, in the rear. When selecting the room, Bernice Record told

never held herself out to be the wife of the defendant; that she did not hold the [illegible] after the defendant was her husband, nor did she or the defendant sign her name on the register of the hotel; that on the morning of January 8, she went to the hotel to meet the defendant, and did so, and walked out of the hotel with him.

(3) The evidence sufficiently shows that the alleged illegal acts were committed in Chicago, Cook County, Illinois. The information alleged it; the police sergeant testified that he lived in Chicago and was a sergeant of police of the fifth District, and he gave a warrant for a violation of the Chicago Code, which he served at 6541 Woodlawn avenue by arresting the defendant; the case was tried before a judge of the municipal court of Chicago. From that the record contains, we are of the opinion that the venue was sufficiently proved. Jackson v. People, 147 Ill. 339; People v. Bullard, 148 Ill. 655; Lehmann v. People, 208 Ill. 73.

(4) We the evidence sufficiently show that the defendant and female Fauver, a single woman, lived together in an open state of adultery and fornication, in violation of Section 117 [illegible] Ill. [illegible] Chicago [illegible] Motivoy, who managed the rooming house, he [illegible], together with that of the police officers, [illegible] circumstantially that for crime [illegible] conditions. On January 6, 1920, the defendant and female Fauver came to the hotel in question and asked for a room. They [illegible] several rooms, and finally selected room 71, on the second floor, in the rear. When registering [illegible] Fauver's name [illegible]

the manager that it was necessary to have a quiet room as the defendant worked nights. Apparently, the room was selected by both of them. Therent agreed upon was 8.00 a week. The defendant paid down $5.00. That day, Sunday, they did not stay after selecting the room, but on the following Wednesday, Bernice Record went to the hotel and paid the manager $3.00, the balance of the week's rent, and took a receipt therefor. The manager testified that at the time she dealt with them, they appeared to be husband and wife. The manager did not see the defendant again until Friday morning, at which time she saw both the defendant and Bernice Record leaving the hotel between 9:30 and 10 o'clock. She also saw them later, about 2 o'clock in the morning on January 12, which was the time when they were both arrested. The police officers saw the defendant and Bernice Record enter the hotel about 1:40 Monday morning, and after making inquiries of the manager, he and O'Connor, another police officer, went to the room on the second floor, where they found the defendant in his pajamas and Bernice Record in bed. They were then arrested. That evidence, in our judgment, quite overwhelmingly demonstrates that they were guilty of the crime charged.

(3) Did the evidence show that the defendant was a married man? The testimony of Weaver, the father of Mrs. Charlotte Fasborg, the alleged wife of the defendant, is that they were married about eight years prior to the trial, and that the ceremony was performed by a preacher at his, the witness's home, at Cedar Rapids, Iowa. He says that they lived together as husband and wife in Cedar Rapids

the manager that it was necessary to have a quiet room as the [illegible] worked night. Apparently, the room was [illegible] by both of them. [illegible] a week. The [illegible] [illegible]. That day, however, they did not stay after [illegible] the room, but on the following Wednesday, [illegible] went to [illegible] and paid for [illegible] 24.00, the balance of the week's rent, and took a receipt therefor. The manager testified that at the time she dealt with them, they appeared to be happily married. The manager did not see the defendant [illegible] Friday morning, at which time she saw both the [illegible] and Bertie Deeson leaving the hotel together with one [illegible]. She also saw them later, about 3 o'clock in the morning, on January 12, which was the time when they were [illegible]. The police officers saw the defendant [illegible] the police patrol car the [illegible] which carry the usual sheet iron security curtain, and [illegible] making inquiries of the manager, he and [illegible], accompanied by [illegible], went to the room on the [illegible] floor, [illegible] the door and in [illegible] [illegible] in bed. They were alone [illegible]. The [illegible], in [illegible], [illegible] everybody [illegible] that they were [illegible] of the crime charged.

(b) The [illegible] was that [illegible] was a married man [illegible] testimony of [illegible], [illegible] [illegible]. Particularly [illegible], the [illegible] [illegible] in that they were married about [illegible] [illegible] trial, by that [illegible] [illegible] [illegible] at the [illegible], the [illegible] home, [illegible] [illegible] that they lived together [illegible] [illegible]

until about July 1, 1934, when they came to Chicago. He further stated that at the time they were married, he saw the marriage license and saw the minister make out the certificate. That evidence, uncontradicted, we think is sufficient to prove the marriage.

(4) It is urged that the trial judge erred in permitting Charlotte Faaborg, wife of George Faaborg, the defendant, to testify. The record shows that certain questions were put to Charlotte Faaborg, and were objected to, but without any reason given, and that later, after a colloquy between court and counsel as to the right of the wife to testify, it was, evidently, agreed that her testimony should go in subject to objection, and be ruled upon later; and that thereafter no ruling was made. There is no doubt that the evidence was improper as to the husband and was proper as to Bernice Record, but, as both cases, by agreement, were being tried together, and the trial judge said he would not consider the wife's testimony as against her husband, we are of the opinion that this contention is untenable.

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

until about July 1, 1924, when they came to Mexico. So further stated that at the time they were married, he was an American citizen and was the minister main in the capital. That evidence, uncontradicted, we think is sufficient to prove the marriage.

(4) It is urged that the trial judge erred in permitting Manuelita Ramos, wife of Jesús Ramos, the defendant, to testify. The record shows that certain questions were put to Manuelita Ramos, and were objected to, but without any reason given, yet later, after a colloquy between counsel as to and as to the right of the wife to testify, it was, evidently, agreed that her testimony should go in subject to objection, and be ruled upon later; but that question no ruling was made. There is no doubt but the evidence was improper as to the husband and was proper in to Jesús Ramos, and, as said above, by agreement, was being tried together. In the trial judge said he would not consider the wife's testimony as against her husband, as was of the opinion that this contention is untenable.

Finding no error in the record, the judgment will be affirmed.

[illegible]

[illegible]

2M 2-4-23

The People of the State of Illinois, defendant in error, v.
Bernice Record, plaintiff in error. Gen. No. 30,264.

Prosecution for [illegible] adultery from [illegible] involution and sentence

r to the Municipal Court of Chicago;
Superior Court of Cook county;
eal from the Circuit Court of county;
County Court of county;
Hon. , Judge, presiding. Heard
the Branch Appellate Court
this court at the term,
rmed
ersed on authority of [illegible] 30,264.
~~ersed and remanded with directions.~~
non filed Rehearing denied
for appellants.
for plaintiffs in error.
for appellees.
for defendants in error.
ESIDING JUSTICE delivered the opinion of the court.

240 I.A. 670

Charlotte Faaborg, charging that the defendant, Bernice Record, on January 11, 1925, and on other days - being at that time a single woman - and George Faaborg, being a married man, unlawfully and wrongfully lived together in an open state of adultery and fornication, in violation of Section 11, Paragraph 23, Chapter 38, Cahill's Revised Statutes of 1921. On the same day, the defendant appeared in person and waived a jury trial. The bond of the defendant was fixed at $1,000.00, and the cause set for trial on January 21, 1925. The defendant pleaded not guilty. Subsequently, there was a trial, the defendant, Bernice Record, and one George Faaborg being, by agreement, tried together, and a judgment finding the defendant, Bernice Record guilty, as charged, and sentencing her to confinement in the House of Correction for the term of fifteen days.

31 - 30264

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

BERNICE RECORD,

Plaintiff in Error.

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

240 I.A. 670

Opinion filed Feb. 3, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On January 12, 1925, an information, upon leave being obtained, was filed in the Municipal Court by Charlotte Faaborg, charging that the defendant, Bernice Record, on January 11, 1925, and on other days - being at that time a single woman - and George Faaborg, being a married man, unlawfully and wrongfully lived together in an open state of adultery and fornication, in violation of Section 11, Paragraph 23, Chapter 38, Cahill's Revised Statutes of 1921. On the same day, the defendant appeared in person and waived a jury trial. The bond of the defendant was fixed at $1,000.00, and the cause set for trial on January 21, 1925. The defendant pleaded not guilty. Subsequently, there was a trial, the defendant, Bernice Record, and one George Faaborg being, by agreement, tried together, and a judgment finding the defendant, Bernice Record guilty, as charged, and sentencing her to confinement in the House of Correction for the term of fifteen days.

The record of this court shows that on April 23, 1925, on motion by Bernice Record, plaintiff in error, this cause was, on May 11, 1925, consolidated with the cause bearing General Number 30263, for hearing, - the record, abstracts and briefs filed in General Number 30263 to be taken and considered as those in cause General Number 30264. We have this day handed down an opinion in the cause of the People of the State of Illinois v. George Faaborg, General Number 30263, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

The record of this court shows that on April 25, 1958, on motion by Bennie Woods, plaintiff in error, this cause was, on May 11, 1958, consolidated with the cause bearing General Number 30625, for hearing. - The record, pleadings and briefs filed in General Number 30625 to be taken and considered as there in cause General Number 30724. We have this day handed down an opinion in the cause of the People of the State of Illinois v. George Pembrey, General Number 30625, which is decisive of this case, and which is here adopted as showing the reasoning of the court applicable to the present case.

The judgment is, therefore, affirmed.

AFFIRMED.

THOMSON, P.J., and [illegible], J., concur.

56 - 30304

TOWER FURNITURE COMPANY, Inc.,

Defendant in Error,

v.

BRIDGEPORT FURNITURE COMPANY, JULIUS JANELIUNAS and WILLIAM PICKTORMAN,

Plaintiff in Error.

ERROR TO MUNICIPAL COURT OF CHICAGO.

240 I.A. 670

Opinion filed Feb. 3, 1926.

MR. JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the defendants William Pictorman, Julius Janeliunas, and the Bridgeport Furniture Company, from a judgment obtained against them in the Municipal Court of Chicago, in favor of the plaintiff, the Tower Furniture Company, in the sum of $181.00.

On July 18, 1924, the plaintiff, the Tower Furniture Company, filed a statement of claim against the defendant, the Bridgeport Furniture Company, as follows: "that the defendant is indebted to the plaintiff in the sum of One Hundred Eighty One Dollars ($181.00) for furniture sold to the defendant at its special instance and request; a detailed itemized statement of the article of furniture for which this suit is commenced has been forwarded to the defendant; defendant accepted the furniture and agreed to pay the sum of One Hundred Eighty-one ($181.00) Dollars for the same, but although frequently requested to

do so, has neglected, failed and refused so to do, to the damage of the plaintiff in the sum of Two Hundred ($200.00) Dollars, wherefore he brings this suit." Attached to the statement of claim was an affidavit of claim that the amount due the plaintiff from the defendant was $181.00.

On July 18, 1924, a summons, directed to the defendant, the Bridgeport Furniture Company, was issued, and subsequently returned, showing service on the Bridgeport Furniture Company by delivering a copy thereof to W. H. Picktorman, agent of the Bridgeport Furniture Company.

On July 29, 1924, a default was entered against the defendant, the Bridgeport Furniture Company for want of anappearance, and judgment entered in favor of the plaintiff in the sum of $181.00.

On July 30, 1924, an order was entered vacating the default and judgment.

On August 6, 1924, on motion of the plaintiff, it was ordered, "that all records, papers, and proceedings in this cause be and they are hereby amended by making Julius Janeliunas and William Picktorman additional defendants."

On August 7, 1924, an order was entered which contained the following: "Now come the parties to this cause and thereupon this cause comes on in regular course for trial before the court without a jury, and the Court having heard the evidence andthe arguments of counsel, and

do so, has neglected, timely and reasonably to do, so the damage of the plaintiff in the sum of Two hundred ($200.00) dollars, wherefore he brings this suit." Attached to the statement of claim was an affidavit of Alois that the amount due the plaintiff from the defendant was $200.00.

On July 12, 1934, a summons, directed to the defendant, the Bridgeport Furniture Company, was issued, and subsequently returned, showing service on the Bridgeport Furniture Company by delivering a copy thereof to W. K. Pinkerton, agent of the Bridgeport Furniture Company.

On July 7th, 1934, a default v. Bridgeport Furniture the defendant, was entered in favor of the plaintiff in the sum of $200.00.

On July 23, 1934, a notice was mailed to the defendant and judgment.

On August 6, 1934, an execution was issued, it was returned, "Not all found in, income, and transactions in this county by it they are hereby warned to appear Friday September 14th at 1:30 o'clock afternoon defendants."

On August 7, 1934, an order was entered which contained the following: "Upon motion of this cause on the record this cause comes on to be heard for trial before the court and the jury, and the parties having waived the jury trial, and the court, and the

being fully advised in the premises, enters the following finding, to-wit: We, the jury, find the issues against the defendants, Julius Janeliunas, William Picktorman and Bridgeport Furniture Company, and assess the plaintiff's damages at the sum of One Hundred Eighty One and No/100 Dollars ($181.00)". That order, also shows that motions for a new trial and in arrest of judgment were made and overruled. It, also, shows that judgment was entered on the finding, in favor of the plaintiff and against the defendant, in the sum of $181.00 and costs.

There is before us only the common law record; no bill of exceptions having been filed.

It is contended for the defendant that the statement of claim does not sufficiently state a cause of action. As the statement of claim alleges the amount of the indebtedness to be $181.00; that that indebtedness was for furniture sold to the defendant at its special instance and request; that the furniture was accepted by the defendant, and it agreed to pay therefor, and has, so far, failed to do so, it is our opinion that the statement of claim, especially as it is in a Fourth Class case, sufficiently informed the defendant of the nature of the plaintiff's claim.

This court in McGlunn v. Gillespie, 237 Ill. App. 400, after considering this subject generally, held that all that was required in such a case was "a statement of sufficient facts reasonably to inform the defendant of the claim against him, and that it is not necessary to state sufficient facts to make out a cause of action."

being fully advised in the premises, enters the following finding, to-wit: We, the jury, find the issues against the defendants, Julius Jausilunas, William Lichtveen and Bridgeport Furniture Company, and assess the plaintiff's damages at the sum of two hundred fifty-one and no/100 dollars ($251.00)." Record shows that motions for a new trial and in arrest of judgment were made and overruled. It, also, shows that judgment was entered on the finding, in favor of the plaintiff and against the defendants, in the sum of $251.00 and costs.

There is [illegible] the record, no bill of exceptions having been filed.

It is contended that the statement of claim does not sufficiently state a cause of action. As the statement of claim alleges the amount of the indebtedness to be $251.00; that this indebtedness was for furniture sold to the defendants at their special instance and request; that the furniture was received by the defendants, and he agreed to pay therefor, but has, so far, failed to do so, it is our opinion that the statement of claim, especially as it is in a municipal court case, sufficiently informed the defendant of the nature of the plaintiff's claim.

The court in McCormick v. Hillsmith, 259 Ill. 400, after a discussion of authorities generally, held that all that was required in such a case was a statement of facts reasonably to inform the defendant of [illegible] him, and that it is not necessary to state [illegible] to make out a cause of action.

It is further contended that the order of the Court of August 6, 1934, "that all records, papers and proceedings in this cause be and they are hereby amended by making Julius Janeliunas and William Picktorman additional defendants herein," was ineffective and did not result in making them parties to the suit. With that, we cannot agree. The order that was entered on the next day recites, "Now comes the parties to this cause and thereupon this cause comes on in regular course for trial before the court without a jury, and the court having heard the evidence and the arguments of counsel and being fully advised in the premises * * *". From that we are bound to assume, in the absence of a bill of exceptions showing anything to the contrary, that Julius Janeliunas and William Picktorman were properly made parties defendant.

The 39th Section of the Practice Act authorizes amendments at any time before final judgment, "introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any manner, either of form or substance, in any process, pleading, or proceeding, which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." Hougland v. Avery Coal Company, 246 Ill. 609.

Counsel for the defendant have cited Lehrer v. Valcoff, 93 N. Y. Supp. 540. The court in that case quoted

with approval from Hood v. Hood, 85 N.Y. 561, the following language: "The mere direction that those parties be brought in immediately did not bring them in. They were not represented on the trial by attorney, nor were the defendants afforded any opportunity to answer the amended complaint."

We do not know what the showing was in the Hood case, but as in the instant case the common law record recites that the parties were present; that there was a trial, and evidence and arguments were heard, and as the record shows that all that took place after the order amending the record as to parties, we feel bound to conclude that the new defendants were both properly made and became parties, and became subject to the judgment that was entered.

Although in the original statement of claim the Bridgeport Furniture Company was the only defendant, when the order of August 6, 1934, was entered amending all therecords, papers and proceedings in the cause, and a trial followed that in which, as we have said, the common law record shows that the parties were present, it cannot now be said, bearing in mind also that this is a fourth class case, that the statement of claim was defective.

It is further contended that the judgment is erroneous, in that it does not appear to be based either on the finding of the court, or the verdict of the jury. It is true that in the order of August 7, it is recited, "We, the jury, find the issues against the defendants," although the case was tried before the court without a jury. That, we look upon as the result of inadvertence, and as mere irregularity, and, therefore, as harmless error.

with approval from [illegible], the following language: "The mere dictum that [illegible] is absolutely [illegible] ed on its [illegible], nor can the [illegible] any [illegible] the account [illegible]."

[illegible] the parties [illegible] not [illegible] we feel bound to conclude [illegible] properly [illegible] judgment that was [illegible].

[illegible] defendants [illegible] order of [illegible] papers and proceedings in the cause, [illegible] in action, [illegible] the [illegible] mind [illegible] ment of [illegible].

In [illegible] proceedings, [illegible] on the [illegible] of the court, [illegible] is true that [illegible] the jury, [illegible] ity, and, therefore, [illegible].

Finding no error in the record, the judgment will be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

131 - 29962

STATE BANK OF CHICAGO,
a Corporation,
Defendant in Error,

vs.

HORACE L. BRAND, JOHN KOELLING,
RICHARD HEIDE, WILLIAM ARENS,
LEOPOLD SALTIEL, PAUL LEHNHARDT,
E. J. KRUETGEN and B. WAHLSTEDT,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

240 I.A. 670

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by John Koelling and Richard Heide to secure the reversal of a judgment entered on December 12, 1923, reviving a prior judgment entered December 7, 1915. The proceeding was by scire facias, and as personal service was not obtained upon John Koelling, one of the defendants, an attempt was made to get jurisdiction of his person by constructive service.

Plaintiffs in error argue that the proceedings were wholly insufficient to confer jurisdiction, and the plaintiff has not appeared in this court to support the judgment rendered.

Section 43 of the Practice Act, Smith-Hurd Revised Statutes 1925, chapter 110, p. 1957, provides for constructive service in proceedings to revive a judgment by scire facias. It declares in substance that where the plaintiff shall file an affidavit showing that the defendant "resides, or has gone out of the state, or is concealed within the state, so that process cannot be served upon him, and stating the place of residence of such defendant, if known, *** then, in such case, notice to the defendant may be given by publication and mail in the same manner as is provided by statute for notice in like cases in chancery."

121 - 30062

STATE BANK OF IDAHO,
a Corporation,
Defendant in error,

vs.

NORMAN L. HEARN, JOHN KIMBLING,
RICHARD HAINS, WILLIAM JONES,
LINFORD SALTER, PAUL LAMBERSON,
E. J. EMERTSON and . HAMILTON,
Plaintiffs in error.

Error to District Court
of Ada County.

240 P.2d 670

MR. PRESIDING JUSTICE BARGHOUT

DELIVERED THE OPINION OF THE COURT.

This writ of error was sued out by John Kimbling and Richard Hains to secure the reversal of a judgment entered on December 16, 1952, reviving a prior judgment entered January 7, 1935. The proceeding was by sworn petition, and no personal service was not obtained upon John Kimbling, one of the defendants, attempt was made to get jurisdiction of his person by constructive service.

Plaintiffs in error argue that the proceedings were wholly insufficient to confer jurisdiction, and the plaintiff has not appeared in this court to support the judgment rendered.

Section 45 of the probate act, Ch. 1, Revised Statutes 1932, chapter 1, p. 1932, provides the constructive service in proceedings to revive a judgment by sworn petition. It declares in substance that where the plaintiff shall file an affidavit showing that the defendant "resides, or has gone out of the state, or is concealed within the state, that after diligent search served upon him, and stating the place of the residence of such defendant, if known, and then, in such case, notice to the defendant may be given by publication, which shall be the same notice as is provided by statute for notice in like cases in chancery."

The provisions of the Chancery act with regard to constructive service in such cases is found in section 12, Smith-Hurd Rev. Stat., chapter 22, p. 229. That section provides in substance that the clerk shall cause publication to be made in some newspaper in his county of a notice containing the names of the parties, the title of the court and the time and place of the return of the summons in the case, and that he shall also within ten days of the first publication of such notice send a copy thereof by mail, addressed to such defendant whose place of residence is stated in the affidavit. The section further provides that the certificate of the clerk that he has sent the notice in pursuance of this section shall be evidence.

The plaintiffs in error contend that both affidavit and notice were insufficient. The affidavit was, we think, defective in that it failed to state that service could not be had upon the defendant, John Koelling. The notice was also defective in that it omitted to state the time and place of the return of the writ of scire facias.

Other errors are alleged and argued, but it will not be necessary to consider the same, as, by reason of the defects stated, the court was wholly without jurisdiction. Strict compliance with statutory provisions is necessary to give a court jurisdiction of the parties in case of attempted constructive service. McDaniel v. Correll, 19 Ill. 226; Correll v. Greider, 245 Ill. 378; Reedy v. Camfield, 189 Ill., 254; Eddy v. Eddy, 302 Ill., 446.

For the error indicated the judgment is reversed.

REVERSED.

Johnston and McSurely, JJ., concur.

The provisions of the Chancery act [illegible] to constructive service in such cases is found in section [illegible], British Col. Stat., chapter [illegible], p. 220. [illegible] provides in substance that the court shall order publication to be made in some newspaper in his county of a notice containing the names of the parties, the title of the court and the time and place of the return of the summons in the case, and that no [illegible] shall be within ten days of the first publication of such notice and a copy thereof by mail, addressed to each defendant whose name of residence is stated in the affidavit. The section further provides that the certificate of the clerk that he has sent the notice in accordance of this section shall be evidence.

The difficulty in great contrast that both affidavit and notice were insufficient. The affidavit was, as [illegible], defective in that it failed to state that service could not be made upon the defendant, John Dowling. The notice was also defective in that it omitted to state the time [illegible] of the return of the writ of some [illegible].

Under errors [illegible] and [illegible], [illegible] be necessary to consider the [illegible], as, by reason of [illegible] stated, the court was wholly without jurisdiction. Strict compliance with statutory provisions is necessary to give a court jurisdiction [illegible] the parties in case of attempted constructive service. Kellogg v. Gorrell, 19 [illegible]. 356; Gorrell v. Keller, [illegible] 373; [illegible] v. Gamble, 119 [illegible], 284; [illegible] v. [illegible], [illegible] 416.

For the error [illegible] the judgment [illegible].

[illegible]

Johnston and Gurney, [illegible], [illegible].

22 - 30250

EDWARD N. GWARRO,
Plaintiff in Error,

vs.

EMILIO LONGHI, Trading as
Italian & Greek Products Co.,
Defendant in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

240 I.A. 671

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was the plaintiff in the trial court and brought an action on the case against the defendant, trading as the Italian & Greek Products Co., charging that having theretofore enjoyed a good name and reputation, the defendant, contriving and maliciously intending to injure him, on or about August 21, 1915, in the City of Chicago, County of Cook and State of Illinois, before one of the Judges of the Municipal court of the City of Chicago, falsely, maliciously and without reasonable and probable cause, charged the plaintiff with having feloniously embezzled and appropriated to his own use the sum of $318 belonging to the defendant; that with like malice and without probable cause, the defendant procured the Judge to issue his warrant, and that under and by virtue of this warrant and also by warrant of extradition issued by the Governor of the State of Illinois and addressed to the Governor of the State of Michigan, caused the plaintiff to be arrested, imprisoned and kept in prison, and caused the plaintiff to be taken to the City of Chicago in the custody of an officer of law, to give bail, etc.; that following the arrest the defendant caused plaintiff to be taken before several Judges of the Municipal court of Chicago, to be examined touching the supposed offense; that finally upon the hearing it was adjudged that the

plaintiff was not guilty of the supposed offense, and plaintiff was thereupon discharged out of custody, and the prosecution is wholly ended and determined.

The defendant by his attorney, William Navigato, filed a plea of not guilty and a further plea of the statute of limitations. The praecipe in the suit was filed on November 14, 1922, and on October 7, 1924, William Navigato withdrew his appearance as attorney for the defendant. The case came on for trial before a jury, which returned a verdict for the defendant, on which the court entered judgment for costs against the plaintiff. At a later date an attempt was made by the attorney, Navigato, who had withdrawn from the case, to satisfy the same of record.

It is argued that the court erred in receiving the testimony of a witness for the defendant, who had remained in the court room while evidence was being heard, notwithstanding the order of the court excluding witnesses; that the verdict is against the weight of the evidence, and that the court erred in refusing to give the jury certain instructions requested by the plaintiff. The instructions are not preserved in the bill of exceptions, and are not therefore subject to review of this court. Greenwell v. Hess, 298 Ill., 459, and Bishop v. Dignan, 223 Ill. App. 178.

We shall not discuss the weight of the evidence, as for other obvious error the judgment must be reversed.

The evidence submitted in the case tended to show that plaintiff, Gnarro, had been employed by the defendant as a traveling salesman; that this employment had ceased and plaintiff had begun to work for another firm; that while in the employ of the defendant plaintiff made a loan of money to the defendant, taking his note therefor, which was not paid or which was paid only after it was

transferred to a third party, who brought suit thereon; that afterward the defendant charged that plaintiff had collected from the customers of the defendant the amount of certain bills and had failed to remit the proceeds thus collected to the defendant. The defendant upon the trial introduced evidence tending to justify the charge against plaintiff.

On redirect examination of defendant, over the objection of plaintiff the court received in evidence a letter which the defendant testified he had received from one Carbone through the mail, in answer to a letter written by the defendant. This letter was dated August 19, 1915, and stated:

> "Mr. Longhi: Have received your letter and you can be sure of what I recommend. Today I have been over to Montemarano and took us half a day to find this bill, at the end we finally found it. Best regards, Paul Carbone.
>
> On or about next week will send some money, business slow, be patient."

Over objection of plaintiff's attorney this letter was read to the jury, and the witness then stated, in response to further questions, that he had received a bill marked paid by the plaintiff, Gnarro, and that this was the bill he had testified about. The letter was the statement of a third party, not under oath, written in response to a letter of the defendant, which is not in evidence. It was undoubtedly error to receive the letter in evidence. Capen v. DeSteiger Glass Co., 105 Ill., 185.

For the error indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

transferred to a third party, who brought suit thereon; that after-
ward the defendant charged that plaintiff had collected from the
customers of the defendant the amount of certain bills and had
failed to remit the proceeds thereof to the defendant.
The defendant upon the trial introduced evidence tending to
justify the charge against plaintiff.

On redirect examination of defendant, over the objec-
tion of plaintiff the court received in evidence a letter which the
defendant testified he had received from one Jackson Stone. The
said, in answer to a letter written by the defendant. This letter
was dated August 18, 1916, and stated:

"Mr. Langhit: Have received your letter and you can be sure of
what I recommend. Today I have been over to Jackson's and
took up half a day on that bill. We did not finally
found it. Just remain, Yours truly,

On or about next week will send some money, remains mine,
be patient."

Over objection of plaintiff's counsel this letter was
read to the jury, and the witness then stated, in response to
further questions, that he had received a bill or bills said by the
plaintiff. Omitted, and that this was the bill he had a million about.
The letter was the statement of a third party, not under oath, written
in response to a letter of [illegible], a fact in not in evidence.
It was manifestly error to receive the letter in evidence. Young
v. Kentucky Glass Co., 1 S. W., 177.

"On the other hand [illegible] in evidence as the
cause proceeded.

[illegible]

Johnston and Mahaffey, JJ., concur.

5663

59 - 30307

IDAHO EVAPORATING COMPANY,
a corporation,
Appellee,

v.

A. H. WELCH and H. C. WELCH,
doing business as Welch & Welch,
a copartnership,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

240 I.A. 671

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

On trial by the court, there was a finding and judgment for the plaintiff in the sum of $2,275.58.

Plaintiff is a corporation of Idaho and the defendants a copartnership, doing business in Chicago as general commission merchants. The claim of the plaintiff was for the proceeds of certain cars of prunes shipped by plaintiff to defendants. The affidavit of merits alleged that the transaction with reference to these prunes was with one Vanderberg and not with the plaintiff, and further thatat the request of Vanderberg, defendants remitted the proceeds of the sales to plaintiff, and that plaintiff accepted the remittance in settlement of the account.

Objections of the defendants to certain evidence offered by the plaintiff in order to show the condition and quality of the prunes at the time the shipments arrived in Chicago were offered and were sustained by the court, nevertheless the first contention of the defendants here is that evidence of these conditions was necessary in order to make a prima facie case for the plaintiff, and that as there is no such evidence in the record the judgment should be reversed.

An examination of the statement of claim and affidavit of merits, however, discloses that no issue was raised on the

IDAHO TRANSFER [illegible] NO. 87,
a corporation,
[illegible],

v.

A. H. BUCK and E. C. [illegible],
doing business as [illegible] & [illegible],
a copartnership,
[illegible].

[illegible] DISTRICT
[illegible] COURT.

ON trial by the court, [illegible] judgment for the plaintiff in the sum of [illegible].

Plaintiff is a corporation at Idaho and the defendants a copartnership, doing business in Idaho as general commission merchants. The claim of the plaintiff [illegible] for the proceeds of certain [illegible] to defendants. The affidavit of merits alleged that the transaction [illegible] reference to these [illegible] one Vandenberg and not with the plaintiff, and further that the [illegible] the property of the [illegible] plaintiff accepted the [illegible] in [illegible].

Objections of the defendants to certain evidence offered by the plaintiff in order to show [illegible] presence [illegible] and were [illegible] by the court. [illegible] of the defendants [illegible] necessary in order to make a [illegible] and that [illegible] should be reversed.

An [illegible] of the [illegible] of merits, [illegible]

pleadings as to the condition of the prunes, and it was therefore, we think, unnecessary for the plaintiff to offer evidence to that point. An issue in that regard did arise on the pleadings in L. J. Upton & Co., Inc. v. Reeve, 123 Va. 241, on which defendants rely. Again it is argued that the transactions in question were with one Vanderberg, who acted independently and on his own account, and not as the agent of the defendants. This point is stated in the argument of defendants but not in the points made in their brief. The evidence bearing upon that point is not pointed out or discussed in the argument. Even a casual examination of the evidence, however, indicates that the court was justified in finding that Vanderberg acted as the authorized agent of defendants in the transaction.

After the sale of the last shipment of prunes about November 21, 1922, defendants sent to the plaintiff a memorandum showing several shipments and the balance due to plaintiff of $226.53 and also enclosed a check for that amount. There is no dispute as to the correctness of this statement. Plaintiff's claim arises out of the fact, which seems to be conceded, that Vanderberg as to several of the shipments received the same upon the guaranty that the same would sell at a given price. It is undisputed, as we understand it, that certain of the shipments did not sell for a price sufficient to meet the guaranty, and defendants contend that they had the right to deduct the amount of their loss on the shipments guaranteed from the proceeds of sales of shipments which were not guaranteed.

When the check was first received, plaintiff took the matter up with the agent, Mr. Vanderberg, and later, as he was absent from that territory, plaintiff on June 9, 1923, wrote to defendant explaining its position in the matter, and stating that because of the difference between them plaintiff was still holding the check. Upon the trial, the check was turned over to the defendant, the court stating to the parties that unless it was turned over, he would reduce the judgment by the amount of the check.

pleadings as to the condition of the [illegible], it is [illegible] therefore, to think, nonetheless for the [illegible] to offer [illegible] to [illegible] points. [illegible] in some in [illegible] region of [illegible] on the pleadings in [illegible] v. [illegible], [illegible] v. [illegible], [illegible], or [illegible] [illegible] rely. Again it is [illegible] the [illegible] in [illegible] with one [illegible], who [illegible] independently and on his own account, and not as the agent of the [illegible]. This point is stated in the argument of [illegible] but not in the [illegible] brief. The evidence bearing upon that point is not [illegible] or [illegible] in the argument. Even a [illegible] examination of [illegible], however, indicates that the court [illegible] in finding that [illegible] being acted on the established [illegible] in [illegible].

After the sale of the [illegible] of [illegible] about November 21, 1952, [illegible] in the [illegible] showing several [illegible] of $220.31 and also [illegible] a check for [illegible]. [illegible] in the correctness of this statement. [illegible] the fact, which [illegible] of the shipments [illegible] would call [illegible]. It is [illegible] that certain of the shipments [illegible] meet the [illegible], and [illegible] to deduct the amount of their loss on the [illegible] from the proceeds of [illegible].

Upon the above [illegible] that [illegible] the matter up with the agent, [illegible], and [illegible] by the amount from [illegible], [illegible] defendant explained the [illegible] in the [illegible] because of the difference between [illegible] the check. Upon [illegible], the [illegible] defendant, the court at time to [illegible] turned over, he could reduce the [illegible] by the amount of the check.

The defendants contend on authority of Day-Luellwitz Lumber Co. v. Wallace L. Serrell, 177 Ill. App. page 30, that the retention of this check was for an unreasonable length of time, and as a matter of law constituted an accord and satisfaction.

There was nothing in the check, nor in the memorandum which accompanied it, that would indicate to the plaintiff that if the check was retained it would be in satisfaction of plaintiff's claim, or that the acceptance of the check by plaintiff would be upon that condition.

The dispute, as a matter of fact, had not yet arisen, and there was evidence from which the court could find that when it did arise the matter was promptly taken up with the agent of defendants, and afterwards in his absence, the plaintiff wrote fully to defendants explaining their position in regard to the matter.

As plaintiff points out, the memorandum, which was introduced in evidence and which accompanied the check, does not even purport to be a sales account. No letter was enclosed nor any other statement made by defendants, which could have put the plaintiff upon notice that the acceptance of the check would be considered as a settlement of a disputed account. The retention of the check without cashing it, under such circumstances, did not amount to an accord and satisfaction. South Side Coal Co. v. Gross, 157 Ill. App. 218. See also Steidtmann v. Jos. Lay, 234 Ill. 84; Western Union R. R. Co. v. Franklin Smith, 75 Ill. 496; Rockford, Rock Island & St. Louis R. R. Co. v. Rose, 72 Ill. 183; Canton Union Co. v. Perlin & Gronderff Co., 117 Ill. App. 622. The judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

The defendants contend on authority of Stevens v. Lumber Co., v. Volume 4, general, 107 III. App. page 34, that the retention of this check was for an unreasonable length of time, and on a matter of law constituted an estoppel and ratification.

There was nothing in the check, nor in the correspondence which accompanied it, that would indicate to the plaintiff that if the check was retained it would be in ratification of plaintiff's claim, or that the acceptance of the check by plaintiff would be upon that condition.

The dispute, as a matter of fact, had not yet arisen, and there was evidence from which the court could find that even if did arise the matter was promptly taken up with the agent of defendants, and adjustments in his hands, the plaintiff was fully to defendants explaining their position in regard to the matter.

As plaintiff points out, the memorandum, "Item was introduced in evidence and shows on its face, that it was not even purport to be a final account. The letter was followed by other statements made by defendant. [illegible] plaintiff upon notice that the acceptance of the check would be construed as a settlement of a disputed account. The retention of the check without crediting it, and [illegible] amount to an accord and satisfaction. [illegible] v. Dunne 107 III. App. 324. See also [illegible] 4 [illegible] 111. 47; Western Union [illegible] v. [illegible] 7 [illegible] 1 [illegible]; Rock Island & [illegible] R. Co. v. [illegible] 71 III. 18; Western Union Co. v. [illegible] 111 [illegible] 4 [illegible] the judgment is affirmed.

(Signed).

Johnston and Kennedy, JJ., concur.

78 - 30330

5064a

A. S. MAY,
Appellant,

vs.

SOL FUCHS,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 671

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff in the trial court appeals from an order entered upon the motion of defendant, striking plaintiff's amended statement of claim and dismissing his suit. It appears from the order that it was entered upon the theory that the plaintiff's amended statement did not set forth a cause of action.

The statement of claim thus adjudged insufficient consisted of two paragraphs. The first of these alleged that on or about May 5, 1922, plaintiff delivered to the defendant a certain number, to-wit, eight thousand piston rings for the purpose of having the defendant sell the same for plaintiff for cash, and subsequent thereto, to-wit, on or about June 5, 1922, the defendant entered into an agreement with the plaintiff whereby the defendant promised and agreed to pay the plaintiff the sum of $1500 upon the sale of said piston rings by the defendant; that under and by virtue of said agreement the defendant sold the piston rings, but has refused, neglected and failed to pay the plaintiff, although often requested to do so, to his damage.

The second paragraph consists of what in common law pleading is technically designated as the common counts.

The defendant contends that the question of whether it was error to strike the claim is not properly raised upon this record because the rulings of the court are not preserved by a bill

A.S. Mitt,
Appellant,

vs.

Ben Moore,
Appellee.

24014.671

CERTAIN DECISIONS OF THE WITHIN COURT

CONTRARY TO DECISIONS OF THE COURT.

The plaintiff in the trial court's appeals from an order entered upon the motion of defendant, striking plaintiff's amended statement of claim and dismissing his suit. It appears from the order that it was entered upon the theory that the plaintiff's amended statement did not set forth a cause of action.

The statement of claim filed in this action leaves intact conducted of two conferences. The first of these occurred "at or about May 4, 1932, plaintiff attempted to see defendant's counsel number, to-wit, about unnamed plaintiff claims in the presence of having the defendant and the same for plaintiff for cash, for subsequent therefor, to-wit, on or about June ", 1932, the defendant entered into an agreement with the plaintiff whereby the defendant promised and agreed to p[illegible] plaintiff the sum of [illegible] upon the sale of said platon claims by the defendant; that under and by virtue of said agreement the defendant [illegible] said claim, [illegible] refused, neglected and failed to pay the plaintiff, although often requested to do so, to his damage.

The second count [illegible] the law pleading is technically that [illegible] the common counts.

The [illegible] was error to strike [illegible] in [illegible] record because the rulings of the court [illegible] by a full

of exceptions. It appears, however, from the order entered that the motion to strike was in the nature of a demurrer; and a bill of exceptions is not necessary in such case to preserve the question for review in this court. Harmon v. Callahan, 286 Ill., 59; Cohen et al. v. Flaxman et al., 232 Ill. App. 240; H. & E. Holding Company, Inc. v. W. A. Davis Lumber Co., 229 Ill. App. 409.

The defendant argues that paragraph One of the statement of claim is wholly insufficient, that the statement shows plaintiff's theory to be that defendant was liable as a factor and that the facts alleged are not sufficient to establish a legal liability upon that theory. The paragraph does not, however, aver that the relationship between plaintiff and defendant, out of which the alleged liability arose, was that of a factor. Indeed, in the opinion of a majority of this court, the paragraph is so vague and general in its averments that, construing it most strongly against the pleader (as we understand the rule requires upon a motion to strike for insufficiency) it is very doubtful whether it can be held to state any cause of action upon any theory whatsoever.

The motion, however, went to the whole statement, including the second paragraph consisting of the common counts. The defendant asserts that the common counts are insufficient under the rules of the Municipal court, but cites no authority so holding. Rule 15 of the Municipal Court provides:

> "Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence by which they are to be proved. All allegations shall be as brief as the nature of the case will permit. Every pleading shall be divided into paragraphs so numbered as to be readily identifiable. Failure to so number or correctly number such allegations shall give no occasion for any dilatory motion, but the court will order the pleader to number the same instanter in proper cases."

Rule 20 provides:

> "No demurrer shall be allowed, but the court may, on motion, order any pleading to be stricken out on the ground that it is insufficient in law or does not comply with the rule of this

of exceptions. It appears, however, from the order entered that the motion to strike was in the nature of a demurrer; and a bill of exceptions is not necessary in such case to preserve the question for review in this court. Herman v. Zaillmann, 266 Ill., 98; Cohen et al. v. Pearson et al., 258 Ill. App. 242; U. S. Printing Company, Inc. v. W. A. Davis Lumber Co., 258 Ill. App. 409.

The defendant argues that paragraph (as of the statement of claim is wholly insufficient, that the statement sets plaintiff's theory to be that defendant was liable as a tractor on, that the facts alleged are not sufficient to establish a legal liability upon that theory. The paragraph does not, however, aver that the relationship between plaintiff and defendant, one of which the alleged liability arose, was that of a tractor. Indeed, in the opinion of a majority of this court, the paragraph is no vague as to amount in the averments that, construing it most strongly against the pleader (as we understand the rule requires upon a motion to strike for insufficiency) it is very doubtful whether it can be held to state any cause of action upon any theory of recovery.

The motion, however, was [illegible] not, in-cluding the second paragraph consisting of the common counts. The defendant asserts that the common counts are insufficient under the rules of the municipal court, but cites no authority [illegible] Rule 15 of the municipal court provides:

"Every pleading shall contain a concise statement of the ultimate facts on which the party pleading relies for his claim or defense, as the case may be, but not the evidence in which they are to be proved. All allegations shall be so plain as the nature of the case will permit. Every pleading shall be so [illegible] as to enable a court of ordinary understanding to know what is meant, and to enable a jury to understand the ultimate facts if any, to be proved. Pleadings to number or correctly number [illegible] shall not be ground for objection for any dilatory motion, but the court will order the pleader to number the same [illegible] on motion [illegible]."

Rule 20 provides:

"No demurrer shall be allowed, but the court may, on motion, order any pleading to be stricken out on the ground that it is insufficient in law or is not [illegible] [illegible] this

court, or the court may order a more specific or amended pleading to be filed."

The common counts may not be specific, and in such case the court would no doubt have the power to require a more specific pleading in the nature of a bill of particulars; but we believe it has never been held by any court of review in this state that the common counts are an insufficient statement of a cause of action as a matter of law. The court, we think, erred in so ruling, and for this error the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

court, or the court may order a more specific or amended plead-
ing to be filed.

The common counts may not be specific, and in such
case the court would no doubt have the power to require a more
specific pleading in the nature of a bill of particulars; but we
believe it has never been held by any court of review in this state
that the common counts are an insufficient statement of a cause of
action as a matter of law. The court, as claim, erred in so
ruling and for this error the judgment is reversed and the cause
remanded.

REVERSED AND REMANDED.

Johnston and Doherty, JJ., concur.

506 Se

93 - 30349

A. D. DOBERSTEIN and BRONISLOWA SZOSZOWSKI, Appellants, v. UNION BANK OF CHICAGO, a corporation, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I A. 671

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiffs, appellants here, recovered a judgment against defendant in the sum of $228.16, entered upon the finding of the court.

They contended below and urge here that they were entitled to recover the further sum of $1062.50, with interest, and to that end, prosecute this appeal.

The controversy grows out of an agreement in writing made on March 5, 1924, between the defendant bank, as trustee, party of the first part, and Stephania C. Douvan and Bronislowa Szoszowski, as parties of the second part, whereby the bank agreed to convey by a trust deed certain premises described in the contract for the total consideration of $4250.

The contract stated that $1062.50 was paid upon the execution thereof, "the receipt of which is hereby acknowledged." It further provided for the payment of the balance in monthly payments with interest at the rate of six per cent per annum, the first payment to be made on April 5, 1924, the entire balance with interest to become due at the end of fifty-seven months.

The interest of Stephania C. Douvan under this contract was purchased by the plaintiff, Doberstein, after the execution and delivery of the contract, and under circumstances from which the court was justified in finding that he had full knowledge.

A. E. ROSENSTEIN and
MORNINGLOW ELECTRONICS,
Appellants,

v.

UNION BANK OF CHICAGO,
a corporation,
Appellee.

Appeal from Municipal
Court of Chicago.

MR. JUSTICE MARTIN, MCKINNEY
DELIVERED THE OPINION OF THE COURT.

The plaintiffs, appellants here, recovered a judgment against defendant in the sum of $[illegible], entered upon the finding of the court.

They contended below and urge here that they were entitled to recover the "other sum of $1000.00", with interest, and to that end, presented this appeal.

The controversy grew out of an agreement in writing made on March 5, 1964, between the plaintiff firm, as trustee, party of the first part, and Stephanie [illegible], owner, as trustee, beneficiary, as parties of the second part, whereby the [illegible] agreed to convey by a trust deed certain premises therein in the contract for the total consideration of $[illegible].

The contract stated that $[illegible].00 was paid upon the execution thereof, "the receipt of which is hereby acknowledged." It further provided for the payment of the balance in monthly payments with interest at the rate of six [illegible] per annum, the first payment to be made on April [illegible], 1964, the [illegible] interest to become due [illegible] the 2nd of [illegible] month.

The interest of Stephanie [illegible] herein under this contract was purchased by the plaintiff, [illegible]. After the execution and delivery of the contract, one [illegible] [illegible] the court was justified in finding that he had full knowledge

A preponderance of the evidence tends to show that Eugene W. Douvan was a member of the firm of Douvan and Feigen; that prior to the execution of the contract on about March 4, 1924, the plaintiff, Szoszowski, paid to Eugene Douvan the sum of $550. She did not at that time have, nor had she theretofore, had any talk with the defendant bank or with any of its officers about the matter, and the payment in question was made to Douvan, either at her house or in his office.

The evidence further tends to show that this contract was first signed by the parties of the second part and was presented to the assistant trust officer of the defendant bank for his signature; that the trust officer signed the contract in behalf of the bank, thinking at the time that the bank had or would receive the $1062.50 called for by the contract. As a matter of fact, however, Douvan and Feigen received this money and did not return the same over to the defendant bank. Therefore, although the contract stated that this sum of $1062.50 had been received by the bank, that was not in fact true.

The plaintiffs argue that Douvan and Feigen were agents of the bank in this transaction, but this contention is disproved by an overwhelming preponderance of the evidence.

After the execution of the contract, Mrs. Szoszowski continued to make monthly payments which the defendant bank received and continued so to do until it received information that the title to the property was in such shape that it would be unable to make conveyance of a good and sufficient title. Thereupon it refused to receive further payments and offered to return those payments which had been in fact made to it. Doberstein purchased the Douvan interest in the contract with (as the court was justified in finding) full knowledge of all the facts.

The plaintiffs do not contend that evidence was not admissible in order to show that the amount named in the receipt

A preponderance of the evidence tends to show that Bugess . Darren was a member of the firm of Darren and Tadgen; that prior to the execution of the contract on about March 6, 1924, the plaintiff, accordingly, paid to Bugess Darren the sum of $250. She did not at that time know, nor has she thereafter had any talk with the defendant Bugess or with any of his officers about the matter, and the payment in question was made to Darren, either at her home or in his office.

The evidence further tends to show in a [illegible] manner that after the payment of the second part and was presented to the contract final officer of the defendant bank for his signature; that the first officer signed the contract in behalf of the bank, thinking at the time that the bank had only received the $1000.00 called for by the contract. As a matter of fact, however, Darren and Tadgen received this money on the [illegible] returns the same over to the defendant bank. [illegible], although the contract stated that the sum of $1000.00 had been received by the bank, that was not in fact true.

The plaintiff rests on the proposition that [illegible] of the bank in this transaction, but this contention is [illegible] by an overwhelming preponderance of the evidence.

After the execution of the contract, [illegible] continued to make monthly payments until the [illegible] and continued so to do until [illegible] to the property [illegible] conveyance of [illegible] to receive further payments [illegible] which had been in fact made to it. Subsequently [illegible] interest in the contract with [illegible] full knowledge of all the facts.

The plaintiff is not content [illegible] admissible in order to show that the record [illegible] in the transfer

set forth in the contract was not actually received by defendant, but do contend that the defendant was estopped by reason of the recital in the contract from setting up that it did not, in fact, receive the amount of cash named in the contract.

The facts, however, are in our opinion wholly insufficient to base an estoppel thereon. It does not appear that the plaintiffs relied upon the statement in the contract nor that the bank made any statement with reference thereto with intention to deceive nor that evidence as to the actual amount received would result in any fraud upon the plaintiffs.

The suit, moreover, is not brought upon the contract, but rather based upon the theory that the contract has been rescinded, and the defendants acquiesce in this view. Under these circumstances the plaintiffs were entitled to recover the actual money which the bank had received, and for this amount, they have recovered judgment. They were not entitled to recover more.

What rights, if any, they have as against Douvan and Feigen, to whom the money was actually paid, cannot be determined in this suit for the obvious reason that Douvan and Feigen are not parties. Milligan v. Miller, 253 Ill. 511; Tilletson v. Mitchell, 111 Ill. 518; Employers Liability Assurance Corp. v. Kelly Atkinson Construction Co., 195 Ill. App. 620.

The judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

set forth in the contract was not actually received by defendant, but do contend that the defendant was entrapped by reason of the recital in the contract from writing up that it did not, in fact, receive the amount of cash named in the contract.

The facts, however, are in our opinion wholly insufficient to base an estoppel thereon. It does not appear that the plaintiffs relied upon the statement in the contract nor that the bank made any statement with reference thereto with intention to deceive nor that evidence as to the actual amount received would "ordinarily" be used upon the plaintiffs.

The suit, moreover, is not brought upon the contract, but rather based upon the theory that the contract has been rescinded, and the defendants acquiesce in this view. Under these circumstances the plaintiffs were entitled to recover the actual money which the bank had received, and for this reason, they have recovered judgment. They were not entitled to recover more.

What rights, if any, they have as against the Swanson and Polson, to whom the money was a public trust, cannot be determined in this suit for the obvious reason that they are not parties. Milligan v. Miller, 285 Ill. 81; Gilbertson v. Mitchell, 111 Ill. 818; Employers Liability Assur. Corp. v. Cain, Atkinson Construction Co., 197 Ill. App. 610.

The judgment is affirmed.

A. T. Lane.

Johnston and Dunnigan, JJ., concur.

30353.

CARY MANUFACTURING CO.,
Appellee,

vs.

JOHN S. McCHESNEY,
Appellant.

INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 671

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying his motion to dissolve a preliminary injunction issued upon the filing of the bill.

The injunction in question restrained defendant and his agents during the pendency of the suit from interfering with, obstructing or stopping any of the business of the complainant or its agents, and from entering upon the premises where the employes, officers or agents of complainant were at work for the purpose of interfering with and obstructing the business of complainant, and from gaining entrance to said premises by threats, force, etc., against the agents and employes of the complainant, and from removing from the premises any part of the property or machinery of complainant, and from damaging or injuring the same, and permitting continuous trespassing upon said property, and from doing any acts in the furtherance of any conspiracy to restrain or obstruct complainant and its officers and agents in the management of its business and affairs, and from congregating along and upon the sidewalks, streets and alleys adjoining the premises occupied by complainant for the purpose of intimidating officers, agents or employes, and preventing them from rendering their services to complainant, and from molesting any person employed by complainant.

At the time of the entry of the order denying the motion

JONES.

GARY MANUFACTURING CO., Appellee,	INTERLOCUTORY APPEAL FROM SUPERIOR COURT OF LAKE COUNTY.
vs.	
JOHN S. McCARTHY, Appellant.	

24013.671

No. 24013. FROM THE SUPERIOR COURT OF LAKE COUNTY.

HELD:—That an injunction issued upon the filing of the bill, denying the motion to dissolve a preliminary injunction issued upon the filing of the bill.

This is an appeal by the defendant from an order denying his motion to dissolve a preliminary injunction issued upon the filing of the bill.

The injunction in question restrained defendant and his agents during the pendency of his suit from interfering with, obstructing or stopping any of the business of the complainant or its agents, and from entering upon the premises where the employees, officers or agents of complainant were at work for the purpose of interfering with and obstructing the business of complainant, and from making entrance to said premises by threats, force, or against the agents and employees of the company, and from removing from the premises any part of the property or machinery of complainant, and from the use or injuring the same, and permitting continuous trespassing upon said property, and from doing any act in the furtherance of any conspiracy to restrain or obstruct complainant and its officers and agents in the management of its business and affairs, and from entering on the premises with arms, attorns and other persons employed by complainant for the purpose of intimidating officers, agents or employees, and preventing them from entering their service to work thereon, and from molesting any person employed or about to work.

At the time of the entry of the order denying the motion

to dissolve, the court entered a further order that defendant might "without prejudice to the rights of either the complainant or the defendant in this proceeding, enter the premises *** at the reasonable convenience of complainant solely for the purpose of removing therefrom such property as it may be mutually agreed by complainant and defendant belongs to said John Sherman McChesney, the removal of said property to be conducted at the reasonable convenience of complainant."

The motion to dissolve was supported by the answer and certain affidavits and evidence were also submitted in behalf of the complainant. The record is voluminous, although the issue seems to have been limited by the court to the question of whether the preliminary injunction should be dissolved, the consideration of the case upon its merits being reserved.

The material facts appear to be that the complainant, Cary Manufacturing Company, is an Illinois corporation, and that it is the owner of certain improved real estate in the city of Chicago known as Nos. 1737 and 1739 North Wells street.

The corporation was organized as subsidiary of the Cary Manufacturing Co., a corporation of the State of New York, practically the entire stock of which was owned by Spencer C. Cary, who was also the owner of all the stock of the Illinois corporation with the exception of certain qualifying shares which were endorsed in blank and delivered to him.

The defendant, John S. McChesney, is an inventor of certain wire-tying machinery, for which he obtained patents which were thereafter purchased by the Cary Manufacturing Company of New York at a bankruptcy sale of his assets. Spencer C. Cary and the defendant thereupon entered into a contract by which the defendant agreed to acquire and secure for Cary the right, title and interest in and to certain inventions as specified. This was in December,

to dismiss, the court entered a further order that defendant might without prejudice by the filing of either the complaint or the defendant in this proceeding, after the previous ruling on the reasonable sufficiency of complainant solely for the purpose of temporary injunction and property as it may be actually agreed by complainant and defendant belongs to said John Thomas Lindsey, the removal of said property to be conducted at the reasonable convenience of complainant.'

The motion to dismiss was argued by the counsel and certain affidavits and evidence were also submitted in behalf of the complainant. The record is voluminous, although the issue seems to have been limited by the court to the question of whether the preliminary injunction should be dissolved. The consideration of the case upon its merits is not required.

The material facts appear to be that the complainant, Gary Manufacturing Company, a Illinois corporation, was that it is the owner of certain improved real estate in the city of Chicago known as Nos. 1737 and 1739 North Wells street.

The corporation was organized on February 1, 1919 Gary Manufacturing Co., a corporation of [illegible] New York, practically the entire stock of which was owned by [illegible] G. Gary, who was also the owner of all the stock of the plaintiff corporation with the exception of certain qualifying shares which were conferred in Mark Ann Gallivered to him.

The defendant, John T. Lindsey, is an inventor of certain wire-lying machinery, [illegible] which were thereafter [illegible] by the [illegible] Company at New York at a [illegible] rate of [illegible] per [illegible] and the defendant thereupon entered into a contract by which he [illegible] agreed to furnish and [illegible] of [illegible] the [illegible] interest in and to certain inventions [illegible].

1922, and the defendant states, "I was to deliver to the Cary Manufacturing Co. of New York a satisfactory portable wire tying machine, and they were to pay for the labor and material used, and I was to render my bill for services when completed." The defendant also sold the wire products and tools for the New York corporation on a commission basis. The work of defendant was done and his business conducted at a shop located at 442 North Wells street in the city of Chicago.

On April 16, 1923, the Cary Manufacturing Co. wrote defendant as follows:

> "We have thought it well to organize a small company of our name under the laws of Illinois, and it is necessary that at least one of the organizers and directors shall be a resident of Illinois, and we, therefore, thought we would name you as one of the organizers and also a director for the first year. Please advise us if it is agreeable for us to use your name as an officer of the company, also as one of the organizers."

The Illinois company was therefore organized and purchased for its own use the property located at 1737-1739 North Wells street. On May 15, 1923, the defendant moved his shop to these premises, and he continued to occupy them until a few days prior to the filing of the bill herein. He occupied the third floor as a residence, and the first floor was used as his shop. The precise nature of the agreement by which he occupied these premises is the controlling question in this litigation. The complainant contends that defendant was simply an employe and that upon his discharge a few days prior to the beginning of the suit, his right to occupy these premises being incidental to his employment, also ceased with the termination of that relationship.

The defendant on the other hand contends that his occupancy of the premises was pursuant to a verbal agreement and amounted to a lease of the premises which could not be terminated without giving notice as required by the statute. The defendant

1928, and the defendant stated, "I was in danger in the Gary manufacturing Co. of New York a satisfactory portable wire rating machine, and they were so busy for the labor and material cost, and I was to render as full for service when completed." The defendant also said the wire rating and tests for the New York corporation on a commission basis. The work of defendant was done and his business conducted at a shop located at 147 North Tulip street in the city of Chicago.

On April 16, 1929, the Gary Manufacturing Co. wrote defendant as follows:

> "We have charged it well to operation [illegible] company of our name under the line of Illinois, [illegible] company must at least one of the organizers and directors should be a stockholder of Illinois. [illegible], [illegible], [illegible] as one of the organizers as also a director or the first year. Please advise us if it is agreeable for you to use your name as an officer of the company, also as one of the organizers."

The Illinois company was formally organized and purchased for its own use the property located at 1737-1739 South Wells street. On May 15, 1929, [illegible] a [illegible] shop in these premises, and he continued to occupy them until a few days prior to the filing of the bankruptcy petition. [illegible] the first floor as a residence. [illegible] the first floor was used as the shop. The practice nature of the business was by which a [illegible] premises is the controlling question in this petition. The complainant contends that [illegible] upon the discharge [illegible] be regulating of the [illegible] his right to occupy these premises [illegible] management, also consent with the [illegible] contractually.

[illegible] occupancy of the premises was [illegible] a verbal [illegible] measured to a lease of the premises [illegible] without living notice [illegible] by the [illegible]. The defendant

cites cases to the effect that a writ of injunction may not be used to terminate a tenancy of this sort, and this is undoubtedly the law, as in such case a complainant would have a full and complete remdy at law, while to put defendant out of the possession of premises by means of an injunction would result in depriving him of his constitutional right to a trial of the issue by a jury.

A further question in the case is whether under the facts, as the same appear, the court was justified in finding that the defendant had been injuring certain machinery upon the premises belonging to the complainant company. The evidence upon both these points is contradictory, and we do not think that pending a trial upon the merits we should express an opinion upon its weight further than to say that in our opinion the evidence on both issues was sufficient to justify the court in continuing the injunction in force until the issues might be tried. That is the only question now here for our determination, and after a quite careful consideration of all the evidence we think the Chancellor did not abuse his discretion in continuing the preliminary injunction in force pending a hearing.

The order is therefore affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

otice cases to the effect that a writ of injunction may not be used to terminate a tenancy of this sort, and this is undoubtedly the law, as in such case a complainant would have a full and complete remedy at law, while to put defendant out of the possession of premises by means of an injunction would result in depriving him of his constitutional right to a trial of the issue by a jury.

A further question in the case is whether under the facts, as the case appears, the court was justified in finding that the defendant had been injuring certain machinery upon the premises belonging to the complainant company. The evidence upon both these points is contradictory, and we do not think that pending a trial upon the merits we should express an opinion upon its weight further than to say that in our opinion the evidence on both issues was sufficient to justify the court in continuing the injunction in force until the issues might be tried. That is the only question now here for our determination, and after a quite careful consideration of all the evidence we think the Chancellor did not abuse his discretion in continuing the preliminary injunction in force pending a hearing.

The order is therefore affirmed.

AFFIRMED.

Johnston and Kennedy, JJ., concur.

142 - 30401

FRANK CIMINO,
Appellant,

vs.

IRWIN TUCKER and JOHN KOKENES,
Copartners doing business as
TUCKER & KOKENES,
Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 672

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by Frank Cimino, plaintiff, from a judgment entered against him and in favor of plaintiff for costs, upon a verdict of a jury upon the trial of two consolidated cases.

The pleadings disclose that the co-partnership of Tucker & Kokenes was sued by Cimino for the purchase price of sixty bags of garlic.

Thereafter Tucker and Kokenes sued Cimino upon claim for damages for the non-acceptance of 307 cases of California black olives, which Tucker and Kokenes had theretofore contracted to sell to Cimino, and which he had agreed to buy. The statement of claim set up that upon the refusal of Cimino to accept the olives, Tucker and Kokenes sold the same for his account, resulting in a loss to them of $320.40.

Cimino filed an affidavit of merits, in which he denied all material facts; alleged and averred that the olives tendered were not of the kind and quality which he had agreed to buy; that he had offered to return seven cases which had been delivered, but that Tucker and Kokenes refused to receive the same, whereupon he placed the same in storage, and that the storage thus furnished was of the value of $500. The affidavit further averred that on or about April 10, 1923, upon a consideration of their mutual claims and demands, Tucker and Kokenes were found indebted to Cimino in the sum

of $143.53, which sum was paid by a check for that amount.

The cases were consolidated and the issue submitted to a jury, which brought in a verdict in favor of Tucker and Kokenes, upon which the judgment was entered. The evidence submitted disclosed that there was no controversy about the garlic, and that the copartnership was indebted to Cimino on account of that transaction to the amount claimed.

The evidence further tends to disclose that a controversy arose between the parties about the olives, and that on April 10, 1923, Tucker and Kokenes sent their check to Cimino for the sum of $143.53, the check stating thereon that it was "in full settlement of all obligations to date." This check was received by Cimino on the following day, and he retained the same and held it until after the beginning of his suit. Thereafter, on April 25, 1923, he returned the check to Tucker and Kokenes through his attorney, who at the same time wrote stating in substance that it was returned because it stated that it was in full settlement.

The controverted facts with reference to the olives, we regard as settled by the verdict of the jury, and the appellant does not argue that the verdict is against the preponderance of the evidence.

Error, however, is assigned and argued with reference to the instructions given to the jury.

As is the usual practice in the Municipal court, the court instructed the jury orally. The court told the jury that if it believed from a preponderance of the evidence that Cimino agreed to buy and Tucker and Kokenes agreed to sell and deliver 307 boxes of olives at a certain price and of a quality to be according to a sample submitted, and that Tucker and Kokenes were ready, willing and able to perform on their part, and Cimino wrongfully refused to accept deliver

of $[illegible]. [illegible] was paid by [illegible] to that account.

The cases were consolidated and [illegible] a jury, which brought in a verdict in favor of [illegible] upon which the judgment was entered. The evidence established that there was no [illegible] the vessel, [illegible] the [illegible] to the owners claim.

The evidence [illegible] very close [illegible] 10, 1923, Tucker and [illegible] sum of $[illegible], the [illegible] timeout of all obligations [illegible] claims on the [illegible] until after the [illegible] 1923, he returned [illegible] tonnage, who [illegible] required because [illegible]

The contention [illegible] regard as settled by the [illegible] not [illegible] [illegible] defense.

[illegible], however, [illegible] the instructions [illegible]

[illegible] instructed the jury [illegible] filed from [illegible] and Tucker and [illegible] at a [illegible] [illegible] mitted, and [illegible] [illegible] portions on both [illegible]

of said olives, then Tucker and Kokenes were entitled to recover damages from Cimino, if any, and that the measure of damages, if any, was the full contract price of any olives actually delivered and accepted by Cimino, together with a further sum representing the difference, if any, between the contract price of olives not accepted and the amount realized by Tucker and Kokenes by the re-sale of the olives, and that those damages, if Tucker and Kokenes were entitled to them under the evidence and instructions of the court, should be credited against the sum of money Tucker and Kokenes admitted owing for the sixty bags of garlic. Further, that "If a buyer wrongfully refuses to accept merchandise under a contract of sale, the seller has the legal right to re-sell and recover the loss, if any, from the buyer. The seller is bound to act in good faith and to exercise reasonable diligence and care in making the re-sale. He may sell at public or private sale, and it is not essential for the validity of a re-sale that notice be given to the buyer."

It is argued that the measure of damages was incorrectly stated in this instruction; that the measure of damages is the difference between the contract price and the market price at the time and place of delivery. This is the rule as stated in Section 64 of the Uniform Sales Act, chapter 121½, page 2271, Smith-Hurd Illinois Revised Statutes 1925. In this case, however, it appears that the vendee proceeded under section 60 of that Act, which in the case of goods of a perishable nature provides that the vendor may re-sell goods and recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

It is further argued that the court erred in its instructions with reference to the check. Upon that subject the court told the jury that if it believed from the evidence that a bona fide dispute existed between the parties; that Tucker and Kokenes sent Cimino a check in full settlement of all obligations,

of said olives, then tender [illegible] to recover damages from claims, if any, [illegible] of [illegible], it may, was the full contract price [illegible] contract [illegible] accepted by claims, however - if a [illegible] to [illegible] the difference, if any, between the contract [illegible] not accepted and the amount realized by tender and [illegible] olives, and that [illegible] to them under the evidence [illegible], proof) be credited against the [illegible] for the sixty [illegible]. [illegible] reduce to [illegible] the [illegible], the [illegible] has the legal right to [illegible] loss, [illegible] the buyer. The [illegible] place tender [illegible] sell at public or private sale, [illegible] validity of a tender that [illegible].

It is [illegible] readily [illegible] the difference between [illegible] time and place of [illegible] 64 of the Uniform [illegible], [illegible] Illinois adopted [illegible] 1918. [illegible], however, it appears that the [illegible] the case of [illegible] may re-sell [illegible] accompanied by the [illegible].

[illegible] stipulations with [illegible] court held the jury that it [illegible] "that a loose like climate [illegible] between the [illegible] Kansas and Texas [illegible] in [illegible] cue,

and further that Cimino retained the check an unreasonable length of time in his possession without returning it to Tucker and Kokanes, then Cimino accepted the check and was not entitled to recover; that whether or not Cimino did retain the check an unreasonable length of time was a question of fact. Further, that where a debtor sends its creditor a check that shows a statement to the effect that it is tendered in full settlement of all obligations to date, the creditor's acceptance of the check will operate as a full settlement and satisfaction of all claims, owing to the creditor by the debtor previous to that date.

We think this instruction correctly stated the law. There was conflicting testimony as to the circumstances under which the check was given and retained. It has been held by this court that a retention of a check under such circumstances for a period of three months becomes and amounts to an acceptance as a matter of law. Here, however, it was, we think, properly, in view of the conflicting evidence, submitted to the jury as an issue of fact.

It is further contended that the court erred in refusing to receive evidence as to whether the olives tendered were of merchantable quality. Sub-section 2 of Section 15 of the Uniform Sales Act, Smith-Hurd Illinois Revised Statutes, chapter 121½, is cited to this point. That sub-section applies to goods sold by description. The evidence here shows a sale by sample, and section 16, rather than section 15, is therefore applicable. In such a sale there are implied warranties that the bulk shall correspond with the sample in quality; that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and where the seller is a dealer in goods of that kind, that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. The rejected evidence was not admissible with reference to sale by sample.

4

and further that Quinne repudiated the offer on the reasonable ground of time in his personality without returning it to [illegible] Quinne accepted [illegible] to discover that whether or not Quinne in fact made the offer is irrelevant. Length of time was a question of fact. Further, [illegible] the creation a unilateral contract [illegible] they that it is terminated in the [illegible] of all obligations [illegible], the creditor's acceptance of the offer will create a new and enforceable and activation of all rights, [illegible] the creditor by [illegible] previous or that [illegible].

In [illegible] the time.

There was [illegible] the time [illegible] the clock was [illegible] that a retraction of a clock under [illegible] of three months because [illegible] Law. Here, however, [illegible] conflicting evidence, [illegible] [illegible]

[illegible] Trading to [illegible] merchantable quality. [illegible] Sales Act, [illegible] 1893 [illegible] 1894, [illegible] alled to [illegible] description. [illegible] [illegible] 1s, rather than [illegible] made there are [illegible] the [illegible] [illegible] portability of computers [illegible] law's [illegible] may defect [illegible] on reasonable [illegible] not [illegible] with reference to [illegible].

The issue between these parties was submitted to a jury under instructions which, taken as a whole, fairly and accurately stated the law. The jury found for the defendant, and the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

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To issue between these parties was submitted to a jury under instructions which, taken as a whole, fairly and correctly stated the law. The judgment for the defendant, and the judgment is affirmed.

AFFIRMED.

Johnston and Kennedy, JJ., dissent.

197 - 30458

JACOB GIDWITZ,
Appellant,

vs.

INTERNATIONAL FURNITURE CO.,
et al.,
Appellees.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 672

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The complainant below has appealed from an order and decree in and by which a general and special demurrer, filed by the defendants to his amended and supplemental bill, was sustained and the suit dismissed for want of equity.

The controlling question in the case is whether the court erred in sustaining the demurrer and in dismissing the bill. The material facts, as set forth in the amended and supplemental bill, are that the defendant, International Furniture Company, is a corporation, organized under the laws of the state of Illinois, with a capital stock of $75,000, divided into 1,000 shares, 500 of which are Class A stock of a par value of $100 per share, and 500 shares of which are Class B stock of a par value of $50 per share.

The corporation, as originally organized, had a capital stock of $100,000, and the respective owners of said stock and the respective amounts held by them, are as follows:

P. W. Pelts.....	333 1/3	shares Class A stock
Michael Gidwitz.....	83 1/3	shares Class A stock
Jacob Gidwitz.....	83 1/3	shares Class A stock
Adolph Cohan.....	249	shares Class B stock.
Miriam Cohan.....	1	share Class B stock.

The bill also alleges that on March 14, 1923, the corporation was in need of money and unable to secure credit without assistance from the complainant. Whereupon, the complainant secured such credit by incurring a personal obligation; that complain-

197 - 32468

JACOB GINSBURG, Appellant, vs. [illegible], et al., Appellees.	[illegible] SUPREME COURT OF [illegible].

240 Ill. 472

[illegible] FROM THE [illegible] COURT
[illegible] COUNTY.

[illegible] the complainant seeks the cancellation of certain [illegible] deeds in and by which a general and special [illegible], taken by the defendants to [illegible] and unpaid [illegible], the mechanics' and the suit [illegible] of [illegible].

The controlling question in this case is whether the court erred in sustaining the demurrer and in dismissing the bill. The material facts, as set forth in the [illegible] and [illegible] bill, are that the [illegible], Inc., [illegible] Contracting Company, is a corporation, organized under [illegible] of the [illegible] of Illinois, with a capital stock of $[illegible], [illegible] are Class A stock [illegible] of which are Class B stock [illegible].

[illegible] stock of $[illegible], [illegible] respective amounts [illegible]:

E. E. Potts	[illegible]
Michael [illegible]	[illegible]
Jacob [illegible]	[illegible]
Adolph [illegible]	[illegible]
Julius [illegible]	[illegible]

[illegible] Potts [illegible] operation was in need of money and he [illegible] assistance from his [illegible]. Thereupon, the [illegible] issued such credit by [illegible] a [illegible] [illegible]

ant is still liable upon said guaranty to the amount of $7,840.60 and will so remain liable until giving written notice of its discontinuance to the bank, which he cannot do without injuring the credit and standing of the corporation.

The bill also alleges that Philip W. Pelta is the nephew of complainant, and that the complainant originally became interested in the corporation upon representations made by one Leo Weber and Adolph Cohen that they had invested in said business between $35,000 and $41,000, and complainant agreed to join them in the business and put up cash equivalent to their net assets, and that it was agreed that Cohen and Weber should receive one-half of the stock and complainant and those with him the other half of the stock in the proposed corporation; that the brother-in-law and stepfather of Philip W. Pelta advanced to his nephew $15,000 which with $5,000 theretofore turned over by the complainant to Pelta enabled him to invest $24,000 in the business, complainant and his brother investing a further sum of $13,500 in said business, to make up the balance of $37,500; that Cohen and Weber received one-half of the stock of a par value of $37,500, complainant, his brother and nephew stock of the par value of $37,500, and that the remaining $25,000 worth of stock went into the treasury of the company; that Cohen and Weber, before the incorporation of the company, were extended credit by the Community State Bank, of which the complainant was an officer, in the sum of $2500, and after the incorporation this credit was increased to $5,000 and later by persuasion of the complainant to $10,000, the complainant guaranteeing the bank against loss; that other officers of the bank criticised complainant for the credit as thus extended, whereupon it was arranged to transfer the account of the bank to another bank and apply for credit with said bank, but the bank refused, upon investigation, to extend such credit, which was

[illegible] and is still liable under its guaranty to the amount of $[illegible], and will so remain liable until giving written notice of the discontinuance to the bank, which he cannot do without injuring the credit and standing of the corporation.

The bill also alleges that Philip W. [illegible] is the cause of complainant, and that the embezzlement originally begun interested in the corporation upon representations made by one Lee Weber and Philip Cohen that they had a treasury in said business between $[illegible] and $[illegible], and could insert argument to join them in the business and put up such sufficient to [illegible] that it was agreed [illegible] and Cohen should receive one-half of the [illegible] and [illegible] with the other half of the [illegible] understanding that the [illegible] in-law and [illegible] of Philip [illegible] to the amount $18,000 which [illegible] over by the complainant to Philip [illegible] to invest $[illegible] in the business, complainant and his [illegible] for his share of $[illegible] in said business, [illegible] and later received [illegible] value of $27,000, [illegible] of the [illegible] value of $27,000, and [illegible] $[illegible] of stock was [illegible] the treasury of the [illegible] and later, before the incorporation of the company, [illegible] by the [illegible] State Bank, of which the complainant was an officer, in the [illegible] $2000, and after the [illegible] was increased to $8,000 and later by [illegible] the complainant [illegible], the complainant [illegible] of the bank [illegible] whereupon it was agreed [illegible] another bank and [illegible] the bank [illegible] Cohen, upon investigation, [illegible]

finally obtained through the complainant signing the guaranty hereinbefore mentioned.

It is further averred that it was the desire of the complainant at all times to secure a one-half interest of the business for his son, but that his said nephew was unfriendly in this regard; that Adolph Cohan also knew of this desire of complainant and of the unfriendly attitude of Pelts and that the proposition thereinafter made and described in the bill, which complainant accepted, was agreed to as made by Cohan with the purpose of influencing said nephew to join with him in securing favorable action from the Board of Directors of the Company for such things as Cohan might desire, including a fraudulent raise in the salary of the officers of the company.

The bill further avers that in the latter part of January, 1925, Adolph Cohan visited Michael Gidwitz, the brother of complainant, and made overtures to him for the purchase of complainant's stock and the stock owned by Michael Gidwitz; and thereupon complainant proposed to Cohan that he, the complainant, should make a proposition in writing as to the amount of money and what the Company would be willing to give for the interest of complainant and his brother in the Company; that on February 2, 1925, Cohan, believing that he and his said brother would, if they acted in the matter at all, act together, submitted a proposition in writing; that complainant and his brother never intended to purchase additional stock in the company, and that if any additional stock was to be purchased the same was to be by complainant alone for the sole and only purpose of providing a business for complainant's son, and that complainant, if he purchased the said stock of said Adolph Cohan, intended to return said stock with his present holdings to his son, so that his son might be financially interested in the company and take part in the conduct of the business of the company, so that

finally obtained through the complicated of rising the property hereinbefore mentioned.

It is further averred that it was the desire of the complainant at all times to secure a permanent interest of the defendants for his son, but that his and nephew was merely in this regard; that Adolph Cohen also knew of this desire of complainant and of the mutually relations of Felix and that the repudiation thereinafter made and described in the bill, which complainant accepted, was agreed to be made by Cohen with the purpose of influencing said nephew to join with him in securing favorable action from the Board of Directors of the Company for more things as Cohen might desire, including a financial raise in the salary of the officers of the company.

The bill further avers that in the latter part of January, 1928, Adolph Cohen visited Kansas City, the brother of complainant, and made overtures to him for the purchase of complainant's stock and the stock owned by minored children; and thereupon conferences were proposed to which that he, the nephew, [illegible], who did make a proposition in writing as to the amount of money and what the company would be willing to give for the interest of complainant and his brother in the Company; that on February 2, 1928, Cohen, [illegible] that he and his [illegible] brother would [illegible] in the [illegible] as all, met together, and [illegible] to purchase the complainant and his brother's [illegible] in the company, and that [illegible] was to be purchased the same was to be by [illegible] the sale was only purpose of providing a [illegible] complainant. It was [illegible] complainant. It was arranged the [illegible] tender to return said stock with his [illegible] so that his son might be [illegible] and take part in the meetings of the [illegible]

while the proposition to purchase the stock in said company from complainant and his brother was interesting to his brother, it concerned the complainant alone and did not concern his brother, Michael Gidwitz.

The bill further alleges that at the time the said proposition was submitted the complainant was confined to his home, being ill, and on February 4, 1925, Cohan was informed that the time stated in said proposition was too limited and that Cohan thereupon informed complainant's brother that Cohan was in no hurry and to pay no attention to the time limit in said proposition, and that complainant and his brother, Michael Gidwitz, could have all the time they wanted; that complainant then made an appointment with Cohan and that Cohan, Michael Gidwitz, and complainant met at the office of said Michael Gidwitz on February 6, 1925; "that thereupon your orator made another proposition to the said Cohan, wherein your orator agreed to purchase the 33 1/3 per cent interest the said Adolph Cohan had in said company, at the book value, as of January 1, 1925, which was stated by the said Cohan to be $55,000 plus $10,000 bonus for the good will, and that your orator would pay him, the said Cohan, $30,000 cash when an accountant had checked up the statement hereinafter set forth, which was submitted by said Cohan, and which he said showed said book value as of January 1, 1925, and the balance either in second mortgage notes, the payment of which would be guaranteed by your orator, and which said notes were held and owned by your orator and secured by a second mortgage on the building located at 1832 to 1842 Humboldt boulevard, which your orator had sold in December, 1923, for $250,000, which second mortgage notes were dated December 19, 1923, and payable in series of four, $125 each, on the 19th day of each month to and including June, 1928, and balance to be due on July 19, 1928, with 6 per cent interest per

while the corporation to purchase the stock in said company from complainant and his brother was interesting to his brother, it concerned the complainant alone and did not concern his brother, Michael Olewitz.

The bill in this action alleges that at the time the said proposition was submitted the complainant was confined to his home, during ill, and on February 4, 1929, Cohen was informed that the time stated in said proposition was too limited and that Cohen thereupon informed complainant's brother that Cohen was in no hurry and to pay no attention to the time limit in said proposition, and that complainant and his brother, Alfred Olewitz, could have all the time they wanted; that complainant then made an appointment with Cohen and that Cohen, Michael Olewitz, and complainant met at the office of said Michael Olewitz on January 5, 1929: "that thereupon your orator made another proposition to the said Cohen, whereby your orator agreed to purchase the 32 1/2 per cent interest the said Ralph Cohen had in said company, at the book value, as of January 1, 1929, which was stated by the said Cohen to be $88,000 plus $10,000 bonus for the good will, and that your orator said to the said Cohen, $78,000 upon an accounting and that upon the said Cohen, and which was agreed upon by the said Cohen, and which the said Michael Olewitz and Cohen had agreed upon January 1, 1929, and they had made a further in certain exchange notes, the payment of which should be guaranteed by your orator, and which said notes were well and duly signed by your orator and secured by a second mortgage on the premises of 1320 to 1322 Humboldt boulevard, which your orator at said time believed, 1928, for $220,000, which second mortgage other was taken, December 19, 1928, and payable in series of five, 1 to 5 year, or the 15th day of each month in the following year, 1929, and balance to be due on July 19, 1929, with 6 per cent interest per

annum, or, in lieu of said notes your orator would convey to the said Cohan the equity in a 3-story 12 apartment building with three 5-room and nine 4-room apartments owned by your orator, located at Marquette Road and Carpenter street, Chicago, with a monthly rental of $885, at the price of $70,000, subject to only an incumbrance of $30,000, taxes and installments paid to date of the deed and said Cohan was to receive the balance of $5,000 in cash, and if after an accountant had examined the books for the purpose of checking said statement of January 1, 1925, submitted by Cohan, it found that the book value of said stock was less than $65,000, then the difference was to be deducted from the price; that thereupon the said Adolph Cohan accepted the offer of your orator and agreed upon Fillmore Herwich, a certified public accountant, to check said statement and informed your orator that he was satisfied to take either the said mortgage notes or the equity, as your orator might decide, and your orator thereupon decided to give the notes, to which said Cohan agreed, and said Cohan agreed to meet your orator on February 6, 1925, for the purpose of reducing said agreement to writing and thereby consummate said transaction. And your orator shows that the said Adolph Cohan never kept said appointment; that later on, to-wit, February 7, 1925, your orator met the said Adolph Cohan and requested him to meet that day in the office of Cohan's lawyer, and the said Adolph Cohan refused to meet on said day and fixed the following Monday to meet, when he refused to consummate said sale and still refuses to consummate same; that instead of consummating said transaction or sale, the said Adolph Cohan attempted to deliver to your orator a letter which purported to retract his said proposal of February 2, 1925, and he thereupon informed your orator that he would not go on with any sale and would not sell said stock to your orator; and your orator shows that, for the purpose of carrying through

[illegible]

said transaction with said Cohan, your orator made arrangements to procure and did procure $30,000 wherewith to make payment of said stock to said Cohan; and your orator shows that he stands ready and willing to carry through said transaction and pay said Cohan the price he agreed for said stock, but said Cohan refused to sell said stock to your orator and continues to refuse so to do."

The bill also sets up a statement in detail of the assets and liabilities of the corporation, indicating, as thus computed, the book value of $65,000, and avers the stock is an unlisted stock and is not for sale in the open market and cannot be bought except from parties hereinbefore mentioned as the holders and owners thereof; that it is utterly impossible for complainant to buy any of the stock, and complainant shows and charges that his only purpose in desiring the stock was to give it to his son so that said son might have an interest in an established business.

That it is the intention and purpose of Adolph Cohan to sell the stock either to Philip W. Felts or to the company, and that complainant believes he will do so unless he is restrained by an injunction; that Cohan and Philip W. Felts are in control of the company; that they own seventy-six per cent of the voting power of the corporation; that a special meeting of the board of directors was called for Saturday, February 21, 1925, to take some action with reference to the disposition of the stock or the assets of the corporation, and that notice of said meeting was forwarded to each of the directors of the company; that the board of directors is composed of four members, namely, Philip W. Felts, Adolph Cohan, Miriam Cohan, the wife of Adolph Cohan, and Michael Cidwitz; that they control the board of directors; that one of the purposes of this special meeting was to take action to dissipate the assets of said corporation and thereby compel complainant

said transaction with said Cohen, your orator made application to
Commerce and did procure $50,000 wherewith to make payment of said
stock to said Cohen; and your orator avers that he stands ready
and willing to carry through said transaction and pay said Cohen
the price he agreed for said stock, but said Cohen refused to sell
said stock to your orator and continues to refuse so to do.*

... The bill also sets up a shortage in assets of the
assets and liabilities of the corporation, including, as then
computed, the book value of $38,000, and avers that one in an
unlisted stock and is not for sale in the open market and cannot
be bought except from parties hereinbefore mentioned as the
holders and owners thereof; that it is utterly impracticable for com-
plainant to buy any of the stock, and complainant avers and charges
that his only purpose in instituting this suit was to give to the
complainant that said and highly have an interest in an established
business.

That it is the intention and purpose of Philip K. Kelly to
sell the stock stated to Philip K. Kelly or to the company, and
that complainant believes he will do so unless he is restrained by
an injunction; that Cohen and Philip K. Kelly are in control of
the company; that they can cause a majority of the voting power
of the corporation; that a special meeting of the stockholders
was called for February, 1[illegible], 19[illegible], in this city, for the
action with reference to the disposition of the assets of
the corporation, and stockholders at said meeting was informed
by some of the directors of the company; that the board of direc-
tors is composed of four members, [illegible] Philip K. Kelly, [illegible]
Cohen, Milton Cohen, the wife of Philip Kelly, [illegible]
[illegible]; that they control the board of directors; that one of the
purposes of this special meeting was to take action to dissolve
the assets of said corporation and to pay money contributed

and his brother to sell their stock in the company, and pending a hearing of the cause Philip W. Pelts, Adolph Cohan and Mariam Cohan should be restrained and enjoined from voting any of the stock or taking any action to the detriment of the rights and interest of complainant.

The bill also sets up that a meeting of the board of directors of the corporation was held at the time and place mentioned in the notice and the directors at the meeting undertook to pass two resolutions, one to employ a lawyer to defend this suit at the expense of the company and thereby save themselves the expense of such lawyer, and the other to double the salaries of Adolph Cohan and Philip Pelts and Adolph Cohan; that Philip Pelts and Miriam Cohan voted for that resolution and they were the only directors voting therefor, and thus this action was irregular and void; that the price agreed to be paid by said complainant to said Cohan for his stock is a fair price therefor, and is equal to about three times its par value, and that Adolph Cohan should be compelled to deliver the stock to complainant, upon the payment of the price agreed to be paid by him for the stock.

The bill further avers that complainant is ready and willing and able to comply with his part of the agreement.

The bill makes the defendants thereto, Adolph Cohan, Miriam Cohan, Philip W. Pelts, Michael Gidwitz, and International Furniture Company, a corporation, that they may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby expressly waived; that they may be restrained and enjoined from transferring any of the stock of Adolph Cohan upon the books of the company, or from voting any of the stock of Cohan to the detriment of the rights and interests of complainant, or from taking any action that would in any way prejudice the rights of complainant in and to the stock of Adolph Cohan

and his brother to sell their stock in the company, and sending a
hearing of the cause Philip E. Potts, Adolph Cohen and William Cohen
should be restrained and enjoined from voting any of the stock or
taking any action to the detriment of the rights and interest of
complainant.

The bill also sets up that a meeting of the board of
directors of the corporation was held at the time and place mentioned in the notice and the directors at the meeting undertook to pass two resolutions, one to employ a lawyer to defend this suit at the expense of the company and thereby have determined the expense of such lawyer, and the other to remove the officers of Adolph Cohen and Philip Potts and Ralph Cohen; that Philip Potts and William Cohen voted for this resolution and they were the only directors voting thereon, and that this action was irregular and void; that the price agreed to be paid by said corporation to said Cohen for his stock is a fair price therefor, and is equal to about three times its par value, and that Adolph Cohen should be compelled to deliver the stock to complainant, upon the payment of the price agreed to be paid by him for the stock.

The bill further avers that complainant is ready and willing and able to comply with its part of the agreement.

The bill names the defendants Adolph Cohen, William Cohen, Philip E. Potts, Colonel Chewitz, and International Furniture Company, a corporation, that they may be directed to make full and direct answer to the same, but not on oath, the answer under such rules being expressly waived; that they may be restrained and enjoined from [illegible] the stock of Adolph Cohen upon the books of the company, or from voting any of the stock of Cohen to the detriment of the rights and interests of complainant, or from taking any action that would in any way prejudice the rights of said complainant in and to the stock of Adolph Cohen

or from drawing any increase in salary under the resolution of February 11, 1925, or from paying any attorney for services in this cause, out of the funds of the company; and that Adolph Cohan may be compelled, by the decree of the court, to specifically perform the agreement to sell the stock to complainant.

The briefs and arguments in this case indicate three controlling questions: First, do the well pleaded facts alleged in the bill set forth a valid and subsisting contract for the purchase and sale of the stock in controversy? Secondly, assuming that the bill does set forth facts from which a contract between the parties for the sale of the stock must necessarily be inferred, is the contract of such kind and nature that a court of equity will grant specific performance of it? Thirdly, assuming that the preceding questions are answered in the affirmative, is the contract unenforceable by reason of the provisions of Section 4 of the Uniform Sales Act, which contains the substance of Section 17 of the original Statute of Frauds? See Section 4, Uniform Sales Act of 1915. (Callaghan's Ill. Stat. Ann., vol. 7, p. 7182).

If either of these questions is decided in favor of the defendant, the demurrer was properly sustained.

That the bill sets up much immaterial matter and is in some respects indefinite, is apparent when we note that the prayer for relief does not state specifically whether it is the supposed contract between the parties made on February 2, 1925, or one made on February 6, 1925, which complainant desires to have specifically performed.

From the argument, however, it is apparent that complainant relies on the supposed contract of February 6, 1925.

The law to be applied in cases where the specific performance of contracts is sought has been often declared, and the general rules governing relief of this kind are well set forth

or from drawing any inference in support of the application of February 11, 1929, or from paying any attention to evidence in this cause, out of the funds of the company, and that Joseph Cohen may be compelled, by the orders of the court, to specifically perform the agreement to sell the stock in question.

The trials and proceedings in this case included extensive questioning. First, in the view adopted facts alleged in the bill set forth a valid and subsisting contract for the purchase and sale of the stock in controversy. Second, assuming that the bill does not contain a contract between the parties for the sale of the stock such contract by the defendant, in the contract of over Kind and Nature to a court of equity will grant specific performance of it. Thirdly, assuming that the preceding questions are answered in the affirmative, is the contract unenforceable by reason of the provisions of Section 4 of the Uniform Sales Act, which provides a statute of frauds in the original Sources of Property. See Section 4, Uniform Sales Act of 1915. (Unemployed 11, Stat. Ann., vol. 7, p. 1239).

If either of these questions is found in favor of the defendant, the complaint was properly dismissed.

That the bill does no such [illegible] in some respects [illegible], is a [illegible] that the proper for relief does not arise on a [illegible] or [illegible] the supposed contract between the parties [illegible] on February 7, 1929, on the [illegible] on February 7, 1929, which [illegible] specifically performed.

[illegible] dismissed relied on the supposed contract of [illegible], 1928.

The [illegible] be sustained in [illegible] performance of contracts in [illegible] the general rules governing relief [illegible]

in Dreiske v. Eisendrath Co., 214 Ill., 199. "The specific performance of a contract will only be enforced where the terms are clear, certain, unambiguous, and either admitted by the pleadings or proven with a reasonable degree of certainty. Even in cases where all of these requirements are present a specific performance cannot be demanded as a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the particular case. If the contract is unreasonable or unjust, or for any other good reason should not be enforced, a decree will not be granted, and such refusal will not be a ground for reversal unless it can be said that the sound discretion of the court has been abused." Clipson v. Villars, 151 Ill. 165; Woods v. Evans, 113 id. 186; Long v. Long, 118 id. 638; Brix v. Ott, 101 id. 70; Bauer v. Lumachi Coal Co., 209 id. 316.

It is further undoubtedly the law that (while relief by the way of specific performance is not confined to contracts involving the conveyance of realty) where the contract involves the conveyance of personal property, as a general rule the court will grant specific performance only where there is no adequate remedy at law or where it becomes necessary to enforce a trust. Barton v. DeWolf, 108 Ill., 195; Cohn v. Mitchell, 115 Ill., 130; Ames v. Witheck, 179 Ill., 458.

On the first question, namely, as to whether the facts as alleged by the bill show a valid contract for the sale of this stock, we have some doubt as to whether the allegations of the bill are sufficient to show a contract was in fact made. It is of course elementary that the minds of the parties must meet in order to make a contract, and when a proposition is made by one party and accepted by another, the proposition as made must substantially be accepted and the accepetance must substantially conform to the offer.

in Dwelle v. Bloomfield Co., 214 Ill., 188. "The specific performance of a contract will only be ordered where the terms are clear, certain, unambiguous, and either admitted by the defendant or proven with a reasonable degree of certainty. When in some form all of these requirements are present a specific performance cannot be denied as a matter of right, but rests in the sound discretion of the court, to be determined from all the facts and circumstances of the particular case. If the contract is unreasonable or unjust, or for any other good reason should not be enforced, a decree will not be granted, and such refusal will not be a ground for reversal unless it can be said that the sound discretion of the court has been abused." Gilmore v. Wilkins, 181 Ill. 166; Smith v. Brown, 112 id. 186; Lenz v. Lenz, 172 id. 658; Dale v. Lee, 201 id. 98; Bauer v. Insurance Co., 96 id. 318.

It is further argument in the law that (while relief by the way of specific performance is not confined to contracts involving the performance of legal) where the contract involves the conveyance of personal property, as a general rule it cannot will grant specific performance only where they lie be adequate remedy at law or where it becomes necessary to enforce a trust. Barton v. Barbour, 104 Ill., 195; Cohn v. Kimball, 210 Ill., 187; Moss v. Wilbur, 179 Ill., 458.

As the "last analysis, finally, as to what is the terms as alleged by the plaintiff from a verbal contract for the sale of this stock, we have some doubt as to whether the allegations of the bill are sufficient to show a contract was in fact made. It is of course elementary that the minds of the parties must meet in order to make a contract, and when a proposition is made by one party and accepted by another, the proposition so made must unconditionally be accepted and the acceptance must mutually assent to the offer.

Angle-American Provision Co. v. Prentiss, 157 Ill., 506; Brach v. Matteson, 295 Ill. 387; Quinn v. Daly, 300 Ill. 273.

The proposition, as made by the complainant, which we have heretofore set forth in the exact words of the bill and at length, was, as the bill alleges, "accepted," but a doubt arises as to whether this acceptance was final when we read the further averment of the bill that the defendant Cohan agreed to meet complainant on February 6, 1925, for the purpose of reducing said agreement to writing and thereby consummating the transaction. Of course, the question of whether this contract was to be considered final, as stated in the oral conversations between the parties or only after it was reduced to writing, depends upon the intentions of the parties in that respect. The complainant cites Ridgway v. Wharton, 6 House of Lords, 267, on this point, but a careful reading of that case does not convince us that it sustains his contention. Indeed, the substance of the holding there was that even where a paper was drawn stating with considerable fullness the terms of the proposed contract, the fact that it was sent to a solicitor to have it reduced to form, would generally be considered cogent evidence that the parties did not intend to bind themselves until it was executed after being put in that form.

The complainant also cites and relies on Bolton v. Lambert, 41 Ch. Div. 295, but in that case there was an unqualified acceptance of an offer which was complete, and it was held that the mere fact that, in making the acceptance the acceptor said that he had instructed his solicitor to prepare the necessary documents would not of itself render the acceptance a conditional one.

The tendency of the courts, as will appear from an examination of the cases where similar questions have been considered in this State, is, we think, to hold, where the parties agree that an agreement shall be thereafter reduced to writing and be

thereafter signed by them, that whether this shall be a condition precedent to the completion of the contract must in each case be determined from the facts from which the intention of the parties can be determined. Baltimore & Ohio S. W. R. Co. v. People, 195 Ill. 423; El Reno W. G. Co. v. Stocking, 293 Ill., 494; Scott v. Fowler, 227 Ill., 104; Dreiske v. Eisendrath Co., 214 Ill. 199; Nolan v. O'Sullivan, 148 Ill. App. 316.

Taking the allegations of the pleader most strongly against him, as we think we must do, and considering the indefinite and incomplete nature of the proposition set forth, which it is alleged was accepted, we are inclined to the opinion that it was not the intention of the parties that the contract should become binding and complete until it had been reduced to writing.

Again, it is a serious question, even if we assume the existence of a contract, whether its provisions are so definite and certain and its terms so fair as to make it possible for the complainant to demand specific performance of it.

It will be noticed that the ultimate price to be paid depended upon a check-up of what is denominated the "book value" of the stock. What, to the minds of the parties, "book value" was is not made to appear. Certain it is that the courts, in so far as this question has been considered by them, have not been able to agree upon a definition. Steeg v. Leopold Weil N. & I. Co., 126 La. 101; Gabble v. Gabble, 97 N. Y. Suppl. 773.

Can this court determine from the contract, as alleged in the bill, that Cohan and Gidwitz had the same thing in mind when the term "book value" was used? How was that book value to be determined by Horwich? The defendants ask: Did Gidwitz have in mind that Horwich should merely deduct the total liability items from the asset items as they appear on the books? If so, what books, or by what "check-up?" Did he have in mind that Horwich should act as

thereafter placed by them, that when we this shall be a condition precedent to the completion of the contract and in each case be determined from the facts from which the intention of the parties can be determined. Baldwin & Ohio S. S. Co. v. Pennie, 108 III. 625; Ill Bank V. C. Co. v. Stocking, 98 Ill., 604; Foote v. Taylor, 220 Ill., 104; Drakes v. Discontrik Co., 224 Ill. 190; Kelsey v. O'Sullivan, 146 Ill. App. 216.

Taking the allegations of the pleader most strongly against him, as we think we must do, and construing the pleadings and incomplete nature of the proposition set forth, we find it is alleged was essential, we are inclined to the opinion that it was not the intention of the parties that the contract should become binding and complete until it had been reduced to writing.

Again, it is a serious question, even if we assume the existence of a contract, whether its provisions are so definite and certain and its terms so informal a nature is available for the consideration to depend specific performance of it.

It will be noting that the plaintiffs seeks to be paid depended upon a breakage of what is denominated the "fuel value" of the stock. That, in the minds of the parties, "fuel value" was is not made to appear. Certain it is [illegible] there, in no fact as this question has ever [illegible] by them, have not been able to agree upon a definition. Ellen v. [illegible], 20 [illegible] 1a. 101; Lahiff v. [illegible], 90 [illegible] 3, 8 [illegible] 272.

[illegible] in the bill, that coke and lignite [illegible] the term "fuel value" and [illegible] to be determined by Horlick's. The [illegible] and [illegible] that Bertch should [illegible] the same items [illegible] by what "fuel-value" [illegible] be made in order that [illegible]

investigator, arbitrator, appraiser and judge as to what constituted the assets and liabilities of the corporation? If so, by what rule was he to determine? Should he take the cost, less depreciation, replacement value, cost or market value, the fair market value, fair cash market value, liquidation value, or going value of the real estate and leaseholds of the corporation, the plant, machinery and equipment, tools, dies, apparatus and implements, office furniture and fixtures, raw material on hand, goods in process, finished merchandise, merchandise in transit, merchandise returned by customers, defective, spoiled, damaged or unseasonable goods, accounts receivable, good, bad, or doubtful, and how would that question be determined?

In these and many other respects which might be suggested, the contract as set up in the pleading is so indefinite that it becomes impossible, it seems to us, for a court to say that it is fair and reasonable, and one which a court ought to enforce.

The third question must also, we think, be answered contrary to the contention of the complainant. We think, even if it be conceded that the contract set forth in the bill is a valid one, definite and cogent, and one which ought otherwise be enforced, the court was nevertheless precluded from enforcing it by virtue of Section 4 of the Uniform Sales Act, supra.

We shall not undertake to discuss this question at length. The brief of the defendants, to which no reply brief has been filed by the complainant, discloses that there has been a conflict between the decisions of the courts of last resort in England and the United States as to whether Section 17 of the original Statute of Frauds, which is Section 4 of our Uniform Sales Act, is applicable to contracts providing for the sales of shares of stock in a corporation; the English courts holding that the statute

investigator, arbitrator, accountant and [illegible] as to what constituted the assets and liabilities of the [illegible] bankrupt. If so, by what rule was he to determine? [illegible] would be easy for cost, [illegible] depreciation, replacement value, book or market value, the fair market value, fair net market value, liquidation value, or going value of the real estate and [illegible] of the [illegible] plant, machinery and equipment, tools, dies, [illegible] inventories, office furniture and fixtures, raw materials on hand, goods in process, finished merchandise, merchandise in transit, warehouse receipts by endorsement, [illegible], spoiled, damaged or unmerchantable goods, accounts receivable, good, bad, or doubtful, and how would that question be determined?

In these and many other [illegible] questions, the contract was not so in a [illegible] that it becomes [illegible], it cannot be say that it is fair and [illegible] life, and the [illegible] enforce.

The third [illegible] contrary to the [illegible] of the [illegible]. [illegible] be conceded that the contract [illegible] in a [illegible] [illegible] and [illegible] court was [illegible] section 4 of the [illegible] [illegible].

[illegible] Langer. The [illegible] been [illegible] contract [illegible] Martin and the [illegible] national [illegible] Act, is applicable to [illegible] work in a [illegible] the [illegible]

is not applicable to such contracts, those of the United States, with the exception of Maryland, holding that it is. The question has never been decided by the Supreme Court of this state, presumably for the reason that Section 17 of the original Statute of Frauds was not in force in this state until enacted as a part of the Uniform Sales act.

In view of the decisions of our sister states and the language of the Act, we hold that the statute is applicable. Section 4 of the Uniform Sales Act (unlike the corresponding section of the English statute) is made specifically applicable to "choses in action," and in the following cases our courts have indicated that shares of stock in a corporation should be so classified. First National Bank v. Smith, 65 Ill., 44; Kellogg v. Stockwell, 75 Ill., 68; Magerstadt v. Schaefer, 213 Ill., 351; Rhea v. Powell, 24 Ill. App. 77; Miller v. Doran, 151 Ill. App. 527.

The order is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

is not applicable to such matters, cases of [illegible] with the exception of [illegible], [illegible] it is. The question has never been decided by the [illegible] court of [illegible], presumably for the reason that section 17 of the [illegible] Act of Trade was not in force in this state [illegible] the Sailors' Wills Act.

In view of the decisions [illegible] language of the act, we [illegible] the [illegible] section 4 of the Sailors' Wills Act [illegible] of the British statute) [illegible] "[illegible] in action," and in [illegible] cases [illegible] that events of stress [illegible].

First National Bank v. [illegible], 60 [illegible], 64; [illegible] v. [illegible], 78 Ill., 56; [illegible] v. [illegible], [illegible], 84 Ill. App. 77; Miller v. [illegible], [illegible] Ill. App. [illegible].

The order is affirmed.

[illegible]

Johnston and Karnes, JJ., [illegible].

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NEW YORK LIFE INSURANCE COMPANY, Appellee, vs. ARTHUR A. ALLEN et al. On Appeal of ARTHUR A. ALLEN, Appellant.	APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 672

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal by Arthur A. Allen is from a decree finding that Attie M. Allen was the owner of certain bonds deposited in the court representing the proceeds of certain life insurance policies.

The proceeding was begun by bill of interpleader filed by the New York Life Insurance Co., which issued the policies, setting up that on September 12, 1902, the Company issued a policy of $1000 on the life of Arthur A. Allen, and on September 17, 1902, four policies of $1000 each were issued on his life; that the premiums had been duly paid, and that at maturity of the policies on the 17th day of September, 1922, there was due on the same the sum of $6,727.90; that on January 14, 1907, the company received instruments dated January 12, 1907, changing the beneficiary in the first four of the said policies from Attie M. Allen to Jessie L. Allen, and on November 20, 1907, the beneficiary was changed from J. L. Allen to the executors, administrators or assigns of the insured; that on June 27, 1907, the insured appointed the Life Insurance Co. trustee by a trust agreement attached to the policies; and that on January 20, 1909, the company received an instrument entitled "Separation Agreement," dated January 15, 1909, made between defendants, Arthur A. Allen and his wife,

No. - 30670

NEW YORK LIFE INSURANCE COMPANY,	
Appellant,	
vs.	
ARTHUR A. ALLEN et al.	
On Appeal of Arthur A. ALLEN,	
Appellees.	

APPEAL FROM SUPREME COURT
OF NEW YORK COUNTY

BRIEF OF APPELLEES

A. ROBERTS DUNNING
DEFENDED THE ACTION IN THE COURTS.

This appeal by Arthur A. Allen is from a judgment finding that Arthur A. Allen was the proper and exclusive beneficiary in the court proceeding for recovery of certain life insurance policies.

The proceeding was begun by bill of interpleader filed by the New York Life Insurance Co., which issued the policies, setting up that on September 20, 1909, the company issued a policy of $1000 on the life of Arthur A. Allen, and on September 17, 1909, four policies of $1000 each were issued on his life; that the premiums had been paid by John, who had an interest of the policies in the life of his brother, Arthur; that on the same the sum of $4,777.00; that on January 1, 1917, the company received instructions signed jointly by John, Amy, and the wife of Arthur in the final [illegible] policies from Arthur A. Allen to Jessie E. Allen, and on November 2, 1917, the [illegible] changed from A. A. Allen to Jessie E. Allen, [illegible] signs of the insured, [illegible] 1917, the [illegible] the life insurance [illegible] the policies; and that on January 20, 1919, the company received an instrument entitled "Assignment Action of" [illegible] January 17, 1919, made between defendants, Arthur A. Allen [illegible].

Attie M. Allen; that upon the maturity of the policies the proceeds thereof were claimed by both Attie M. Allen and Arthur A. Allen.

The bill further set forth the provisions of each of the policies, which were that the Insurance company would pay to Attie M. Allen, wife of Arthur A. Allen, the insured, or other beneficiary the sum of $1000 upon the death of Arthur A. Allen, provided such death should occur within twenty years; that the insured reserved the right to change the beneficiary at any time, and that if the insured was living at the expiration of the twenty year period, the company would then apportion to the policy its share of the accumulated profits and the insured should have, among other options, the option to receive the entire cash value in cash and discontinue the policy, and if no selections were made by the insured then the policy would automatically be discontinued and the entire cash value held as a credit payable to the order of the insured; that the agreement, by which the company was appointed trustee, provided that in case the policy should become a claim by the death of the insured during the lifetime of his daughter, Marion C. Allen, and prior to her attaining the age of sixteen years, which would be on April 21, 1911, the company, as trustee, would receive the amount of the policy and hold it until Marion C. Allen was sixteen years of age, and that the agreement should become null and void if the insured should be living when she arrived at the age of sixteen years.

The answer of Attie M. Allen and Marion C. Allen claimed the fund for Attie M. Allen by virtue of certain provisions of the Separation Agreement, which will hereinafter be referred to, and the decree of the court sustains this contention.

There was practically no dispute as to the facts.

Allie E. Allen; that upon the death [illegible] Allen.

[illegible]

of the policies, [illegible] to Allie E. Allen, [illegible] beneficiaries, the sum of [illegible] premiums and [illegible] insured [illegible] and that [illegible] twenty years [illegible] life [illegible] among other [illegible] in dual and [illegible] made by the [illegible] continued [illegible] the order of the [illegible] away was [illegible] should [illegible] litigation [illegible] raising the [illegible] 1911, the [illegible] policy [illegible] and [illegible] should be [illegible]

[illegible] claimed the [illegible] along of the [illegible] turned to, and [illegible]

Arthur A. Allen in his own behalf testified that the policies were in his possession and had been since the respective dates thereof; that he had never assigned any interest in the policies or any of the benefits under them in case he should survive the period of twenty years, and he admitted the execution of the Separation Agreement.

Attie May Allen in her own behalf testified that they had but one child, Marion Campbell Allen, born April 21, 1895, and that she had the custody of this daughter until she became of age.

The Separation Agreement is in evidence. It is dated January 15, 1909, and provides that husband and wife have agreed to live separate and apart during the remainder of their lives; that the wife shall have the custody of the child, and that the husband will pay to the wife $12.50 per week, and discharge the then existing family indebtedness; that the wife shall have the household furnishings as long as she wishes them, and that the payment of $12.50 per week shall be in full satisfaction of the support of the wife and child and of alimony.

With reference to the insurance the contract provides:

> "Said Arthur A. Allen shall also keep up and not permit to lapse or be cancelled for non-payment of dues or premiums, all of the life insurance and accident insurance policies now in force and carried by him upon his life, for the benefit of his said wife or daughter or both, and the beneficiaries named in said policies shall not be changed."

As tending to throw light upon the proper construction of this clause of the agreement, the court admitted in evidence, over the objection of Arthur A. Allen, a letter of said Arthur A. Allen written on February 21, 1909, (subsequent to the execution of the Separation Agreement) to his daughter. Referring to this life insurance, the letter states:

Arthur A. Allen in his own behalf testified that [illegible] notices were in his possession and had been since the recording thereof; that he had never assigned any interest in the policies or any of the proceeds under them in case he should survive the period of twenty years, and he ratified the execution of the Separation Agreement.

Attis Ray Allen in her own behalf testified that they had met on [illegible], Marion County, Illinois, born April 2, 1898, and that she had the custody of this [illegible] until she became of age.

The separation agreement is in evidence. It is dated January 1, 1938, and provides that husband and wife were agreed to live separate and apart during the remainder of their lives; that [illegible] shall have the custody of the child, [illegible] that the husband will pay to the wife $[illegible] a week, and the-- change the then existing family home [illegible]; that the wife shall have the homestead in Marion in fee [illegible] Marion, and that the payment of $[illegible] per week shall [illegible] fraction of the support of [illegible] and [illegible] office.

With reference to the life insurance [illegible] provides:

> "Said wife or A. Allen shall [illegible] keep up and pay all premiums or be credited for [illegible] if [illegible] or premiums, all of the life insurance [illegible] insurance policies now in force and carried by the husband on his life. [illegible] wife of his text wife or heir by [illegible] named in said policies shall not [illegible]."

[illegible] the three [illegible] the [illegible] relation of the parties, the [illegible] dence, over the objection of Arthur A. Allen, a letter [illegible] Arthur A. Allen written on February 1, 1938, referring to the execution of the separation agreement [illegible] to be this life insurance, [illegible]:

"Please tell Mamma that I received her letter. As to the insurances: I have I have one in the N. Y. Life as she knows. This is for $5000.00. $1000.00 of this is now payable to her upon proof of my death. The remaining $4000.00 will be held in trust for you by the N. Y. L. Ins. Co. and paid to you in the form of an annuity of something like $11.00 per week, to begin at the time you are 16 yrs. of age, and to continue for (I think) at least 8 years. If you die before you are 16 yrs. old, the whole of the $5000.00 comes to Mamma at once. Should I be alive at the time you are 16 yrs. old, the whole thing reverts to Mamma after that, -- that is it becomes a regular insurance for $5000.00 for her sole benefit."

It is earnestly argued in behalf of Arthur A. Allen that this letter was not admissible in evidence, because it is said the clause in the Separation Agreement with reference to the insurance policies is not ambiguous nor its meaning doubtful; that it does not purport to assign the insurance policies to Attie M. Allen, but merely obligates Mr. Allen to pay the premiums on all the policies then in force and carried by him upon his life for the benefit of his wife, or daughter, or both, and further that the beneficiaries named in the policies should not be changed. There is much force in this contention. The language of the provision does not seem to be ambiguous nor to require explanation in order to arrive at the clear intention of the parties.

Nor do we think that the letter admitted in evidence indicates, when carefully read, any further or different construction of this provision of the agreement. It is perfectly apparent we think, reading the letter to the daughter in the light cast upon it by the trust agreement, that what the writer says about the $4000 to be held in trust for the daughter and paid to her in the form of an annuity, to begin at the time she is sixteen years of age and to continue for at least eight years, is a statement of fact as to what would happen in case of the father's death. It would then be perfectly true that if the daughter died before she was sixteen years of age, the father also having died prior to that time, that the whole insurance would revert to the mother and

"Please tell [illegible] that I receive her letter. As to the insurance: I have I have one in the [illegible] Life as [illegible] Insurance. This is for [illegible]. Also of this is not payable to her upon proof of my death. The remaining [illegible] will be held in trust for you by the [illegible]. [illegible] you in the form of an annuity of [illegible] per week. So begin at the time you are 16 yrs. of age. [illegible] for (I think) at least 8 years. If you die before you are 16 yrs. old, the whole of the [illegible] to [illegible] at once. Should I be alive at the time you are 16 yrs. old, the [illegible] payable to [illegible] after that. -- What is it become of [illegible] Insurance for [illegible] for her sole benefit."

It is earnestly argued in behalf of Article 4, Alien that this letter was not admissible in evidence, because it is said the clause in the Constitution agreement with reference to the insurance policies is not mandatory nor is requiring [illegible]; that it does not purport to assign the insurance policies to Annie M. Alien, but merely obligates Mr. Alien to pay the premiums on all the policies then in force and secured by him upon his life for the benefit of his wife, or children, or both, and that under the beneficiaries named in the policies cannot not be changed. There is much force in this contention. The language of the contract does not seem to be mandatory nor is requiring [illegible] in order to arrive at the exact intention of the parties.

Nor do we think that the letter admitted in evidence indicates, when carefully read, any intent on the part of the [illegible] tion of this provision of the agreement. It is reasonably apparent to think, reading the letter [illegible] it by the usual [illegible], that [illegible] $4000 to be held in trust [illegible] the form of an annuity [illegible] of age [illegible] fact as to what would happen in case of the [illegible]. It would seem [illegible] time [illegible] was [illegible] time, that the whole [illegible]

become, as he says, a regular insurance for $5000 for her sole benefit. There is no language, either in the provision of the Separation Agreement or in the letter, which can be construed into an assignment of these insurance policies, or that either the mother or the daughter were to take any benefits from the same, except upon the contingency of the father's death.

Courts do not make contracts for litigants and may not relieve them of the obligations arising out of the terms of contracts which have been voluntarily made. There is not a sentence, as we read them, in either the agreement or the letter, which would indicate that, with the father, mother and daughter living, there was any intention other than that the mother should receive the amount of $12.50 per week with other properties specifically mentioned in the agreement.

The decree of the Superior court is reversed and the cause remanded, with directions to enter a decree finding Arthur A. Allen to be the true owner of the funds in controversy, and directing the same to be turned over to him.

REVERSED AND REMANDED WITH DIRECTIONS.

Johnston and McBurely, JJ., concur.

because, as we saw, a [illegible] insurance for [illegible] [illegible] case-
lit. There is no language, either in the provision of the insurance-
tion agreement or in the policy, which can be construed into an
assignment of a mere insurance policies, or that either the mother
or the daughter were to take any benefits from the same, except
upon the contingency of the "living a child".

Courts do not make contracts for litigants and may
not relieve them of the obligations entered into at the terms of
contracts which have been voluntarily made. There is not a sentence,
as we read them, in either the agreement or the policy, which would
indicate that, with the death, mother and daughter, there
was any intention other than that the mother should receive the
amount of $10,000 per week with other provisions [illegible] [illegible] [illegible]
[illegible] in the agreement.

The terms of the [illegible] policy is recognized [illegible] the
cause remained, with directions to enter a decree finding [illegible]
A. Allen to be the true [illegible] of the insured [illegible], and
directing the same to be turned over to him.

REVERSED AND REMANDED WITH DIRECTIONS.

Johnston and Kohlsaat, J.J., concur.

224 - 30485

LUDWIG H. KOEPKE, Appellee, v. GEORGE ZOELLER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $100 entered upon the finding of the court.

The claim of the defendant was for work, labor and services rendered and materials alleged to have been furnished by plaintiff to defendant at defendant's request.

The statement of claim showed a total demand of $119.32, which included interest amounting to $1.72 accrued since the account was stated between the parties.

It is argued by the defendant that the judgment is not sustained by the evidence. The only witnesses who testified were the plaintiff and defendant. Plaintiff also introduced a post card signed by the defendant, in which defendant said that he would like to have plaintiff call and put in a new stop cock in the toilet in the yard, the card also stating, "you have to have a man to dig up the ground and this should be done soon before the weather will get too bad."

The plaintiff testified that on or about the 8th day of December, 1924, he went to defendant's drug store and presented a bill for $117, and defendant told him he would pay for it in a week or so. The plaintiff also testified that he was not in the business of selling plumbing supplies, but that he purchased certain supplies for which he paid $21.95. He further testified that he did not know how much time was spent in putting in this plumbing

224 - 3.4.45

LEWIS H. BRICKER,
Appellee,

v.

GEORGE ROLLER,
Appellant.

Appeal from Common Pleas Court of Cuyahoga County, Ohio.

MR. JUSTICE MATTHIAS DELIVERED THE OPINION OF THE COURT.

This is an appeal in the [illegible] from a judgment in the sum of $[illegible] entered upon the finding of the court.

The claim of the defendant was for work, labor and services rendered and materials furnished in more than [illegible] by plaintiff to defendant [illegible].

The statement of claim showed [illegible] at $[illegible], which included interest amounting to $[illegible]. A [illegible] account was stated between the parties.

It is argued by the [illegible] that the judgment is not sustained by the evidence. The only witnesses are testifying [illegible] the plaintiff [illegible]. Plaintiff also introduced a [illegible] signed by the [illegible], in which [illegible] said [illegible] "I'd have plaster [illegible] and put up a new stove. Look in the ledger in the place, the [illegible] is right. [illegible] up the ground [illegible] get too [illegible]."

The [illegible] December, 1945, he went to [illegible] bill for $[illegible], and [illegible] work on me. The plaintiff [illegible] business of selling [illegible] weekdays for [illegible] did not know he was [illegible] [illegible]

and the work; that he was there two separate days, about an hour each day; further, that the union scale of wages for plumbers doing that kind of work was $2.25 per hour.

The defendant testified that he desired only such work done as was outlined on the post card. He testified that he was present all the time each day, with the exception of a few hours, and that the plumber did not work any four days, or any thirty-eight hours as claimed by the plaintiff; that he worked only parts of days, about eight hours the first day, on the second about three hours and on the third day about one and a half, and that altogether the plumber did not work to exceed two full days of eight hours. For this time he said he was willing to pay.

The defendant also denied that he ever agreed to pay the sum of $117 for the bill presented, but said that on the contrary, he told plaintiff it was too much and offered to pay him $50 to settle it. This was the substance of all the testimony introduced. Whereupon, the following colloquy occurred:

The Court: "I believe Mr. Koepke is entitled to $117, but as a personal favor to Miss Spooner, I will make it $100, and I believe there was an account stated."

Miss Spooner: "I object to any such finding as being excessive and not conforming to the testimony. Mr. Koepke has testified to the value of the stuff furnished which was anywhere from thirty to fifty per cent of which he charged in his statement of claim. He also testified that he did not know how much work his assistant had put in on the place and that Mr. Zoeller, the defendant, admitted that the assistant worked the most of two days, or eight hours a day at the union scale of wage $2.25 an hour, $40 would be a plenty, and that $22 is a liberal estimate of the value of the material furnished."

Thereupon, defendant made a tender in court of $70, which was refused.

and the work; that he was there the separate days, about an hour each day; further, that the union scale of wages for plumbers doing that kind of work was $1.75 per hour.

The defendant testified that he desired only such done as was outlined on the post card. He testified that he was present all the time each day, with the exception of a few hours, and that the plumber did not work any four days, or any thirty-eight hours as claimed by the plaintiff; that he worked only parts of days, about eight hours the first day, on the second about three hours and on the third day about one and a half, and if I interpret the plumber did not work to exceed two full days of eight hours. For this time he said he was willing to pay.

The defendant also denied that he ever agreed to pay the sum of $117 for the bill presented, but said that on the contrary, he told plaintiff it was too much and offered to pay him $50 to settle it. This was the substance of all the testimony introduced. Thereupon, the following colloquy occurred:

> The Court: "I believe Mr. Sopple is entitled to the $117, but as a personal favor to Mike Spencer, I will make it $100, and I believe that's the reasonable charge."
>
> Mike Spencer: "I object to any such finding as being erroneous and not pertinent to the issue. Mr. Sopple has testified to the value of the labor performed which was expensive from thirty to fifty-two a week of which he charged in his statement of claim. He also testified that he did not know how much work his assistants had put in on the place, and that Mr. Sopler, the foreman, supervised the amount of work. The most he had for days, or eight hours a day at the union scale of wages $1.25 an hour, he would be a clerk, and $25 is a liberal allowance on the value of the substantial labor."

Thereupon, defendant's motion to vacate the order of 1?, which was released.

The Court: "I am making a finding of $100 just because of the ability with which you have tried this case, but if you appeal this case, I will make a finding of the full amount of $117.60."

Miss Spooner: "While I am always willing to, and am a good enough sport, to abide by the usual findings of the Court, yet I feel the Court must consider me a very cheap attorney if I am worth only $17 in this case and I object to the remarks of the Court in penalizing my client for exercising his rights as a citizen to appeal."

The Court: "Mr. Zoeller, I don't believe a word you have said in this case."

Miss Spooner: "I object to the remarks of the Court in impeaching the character of my client in open court. I do not represent a class of clients which the Court has implied in his remarks."

The Court: "If you appeal this case, I shall certainly set this judgment at $117."

Miss Spooner: "I object to the remarks of the Court."

Plaintiff has not appeared in this court to support the judgment entered. Plaintiff relied upon a stated account supported only by his uncorroborated testimony which was denied by the defendant who also gave material testimony as to the time put in doing the work. This testimony was not rebutted.

The evidence indicates, however, as a matter of fact that the sum of $70 was due to the plaintiff and as the trial was by the court, the judgment will be reversed with a finding of fact, and judgment entered here in favor of plaintiff for the sum of $70, costs in this court to be taxed against the plaintiff.

REVERSED WITH A FINDING OF FACT.

Johnston and McSurely, JJ., concur.

The Court: "I am making a finding of fact in I see no of the ability with which you [illegible] this case, but if you proceed into it, I will make a finding of the full amount of $[illegible]."

Miss Spooner: "While I am [illegible] to, [illegible] good enough court, in view of the [illegible] of the Court, yet I feel the [illegible] rather an a very close attorney [illegible] only GIF in this case and I object to the [illegible] of the Court in [illegible] by [illegible] for overruling his rights [illegible] to appeal."

The Court: "Mr. Doolittle, I don't believe a word you have said in this case."

Miss Spooner: "I only [illegible] to the remarks of the Court in impugning the character of my client. In open court, I do not represent a class of clients which the Court has implied in his remarks."

The Court: "If you [illegible], I [illegible] [illegible] this [illegible]."

Miss Spooner: "I object to the remarks of the Court."

Counsel has not appeared in [illegible] the judgment entered. Counsel [illegible] only by his [illegible] who also gave [illegible] the [illegible] and is [illegible]. This testimony was not [illegible].

The [illegible] the [illegible] the sum of [illegible] in the [illegible] was by the court. The judgment will be [illegible] [illegible], and judgment [illegible] in favor of [illegible] [illegible], and in this court [illegible].

[illegible]

Johnston [illegible] for [illegible], [illegible].

224 - 30485

FINDING OF FACT.

We find as a fact from the evidence that there is due to the plaintiff, Ludwig W. Koepke, from the defendant, George Zoeller, on account of the claim for which suit is brought in this case, the sum of $70.

ZGA - 21445

JURISDICTION OF FACT.

We find as a fact from the evidence that there is due to the plaintiff, Lydia E. Cooper, from the defendant, George Zoeller, on account of the 1.1 [illegible] sale is brought in [illegible], the sum of $70.

30553

291 - 30553

Z. MALAUSKAS,
Appellee,

vs.

J. A. KOSCHING,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 673

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff brought suit for forcible detainer, alleging that defendant withheld from the plaintiff possession of certain premises known as 5353 South Halsted street in the City of Chicago.

There was a trial by the court without a jury and a finding that the defendant was guilty and judgment upon the finding for the possession of the premises, and that a writ of restitution issue with judgment for costs, against the defendant.

At the close of all the evidence defendant made a motion that the issues be found in his favor, which was denied. Propositions of fact and of law were submitted to the court by defendant, and these rulings of the court are assigned as error.

The evidence tends to show, without dispute, that defendant entered into possession of the premises under a written lease dated March 3, 1924, made between defendant and one Meyer, at that time the owner of the premises; that the lease in and by its terms demised the premises, to be occupied for office and living rooms only, term beginning April 1, 1922, and ending April 2, 1925, at a rental of $35 a month, payable in advance.

The lease in and by its terms provided, "Option hereby given for two years more with nominal increase of rent." The lease further provided that all of the covenants, promises, representations

2401 - 2482

C. MALAGURAN, Appellee,	
vs.	
T. A. MORANIRO, Appellant.	

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 673

MR. PRESIDING JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

In this case the plaintiff brought suit to replevin [illegible] tenant, alleging that defendant withheld from the plaintiff possession of certain premises known as 2482 South [illegible] in the City of Chicago.

There was a trial by the court without [illegible] finding that the defendant was entitled to judgment upon the finding for the possession of the premises, and [illegible] issue with judgment for costs, of that the [illegible].

At the close of all the evidence [illegible] that the lease in issue in this [illegible] of fact and [illegible] law were submitted to [illegible] finding of [illegible].

The [illegible] defendant entered into possession of the premises on [illegible] dated March [illegible], 1954, and [illegible] time the [illegible] demised the premises [illegible] been beginning April 1, 1954, and [illegible] 2528 S South, payable in [illegible].

The lease in [illegible] given for the years more with [illegible] further provided that all [illegible] [illegible]

and agreements therein contained shall be binding upon, apply and inure to the benefits of the heirs, executors, administrators or assigns respectively of lessor and lessee, and further:

> "If Lessee shall vacate or abandon said premises or permit the same to remain vacant or unoccupied for a period of ten days, or in case of the non-payment of the rent reserved hereby, or any part thereof, or of the breach of any covenant in this lease contained, lessee's right to the possession of the demised premises, thereupon shall terminate, with or without any notice or demand whatsoever, and the mere retention of possession thereafter by Lessee shall constitute a forcible detainer of said premises, and if the Lessor so elects, but not otherwise, and with or without notice of such election or any notice or demand whatsoever, this lease shall thereupon terminate, and upon the termination of Lessee's right to possession, as aforesaid, whether this lease be terminated or not. Lessee agrees to surrender possession of the demised premises immediately, without the receipt of any demand for rent, notice to quit or demand for possession of the demised premises whatsoever, and hereby grants to Lessor full and free license to enter into and upon said premises or any part thereof, to take possession thereof with or without process of law, and to expel and remove Lessee or any other person who may be occupying the said premises or any part thereof as a member of his family or otherwise," etc.

The evidence for the plaintiff was to the effect that he purchased the premises in September, 1924, and that the defendant paid the rent for September, October, November and December of that year, but did not pay any of the rent which thereafter accrued; that plaintiff twice demanded payment thereof, and defendant replied that he did not have the money; that plaintiff then asked him to vacate the premises, and that defendant promised to move in March; that he did not do this, but remained in possession up to the time of the trial.

The defendant denied that he had ever said that he would not pay the rent because he did not have it. On the contrary defendant says that in a conversation with plaintiff in the early part of January, 1925, defendant told plaintiff that he would pay the rent but refused to pay a repair bill demanded by the plaintiff, and that he had another conversation to the same effect in the month of February, and again about the 10th of March, and upon the trial defendant tendered to the plaintiff rent for the months of January,

and agreements therein contained shall be binding upon, inure to the benefit of the parties, respective, administrators or assigns respectively of Lessee and Lessor, as herein.

"If Lessee shall work or cause to be done any public improvements or permit the same to remain unfinished for a period of ten days, or in case of the commencement of bankruptcy proceedings, or any part thereof, or in the event of any covenant or condition herein contained, Lessee's right to the premises [illegible] shall terminate, whereupon Lessee shall immediately [illegible] or leave whatsoever, and the mere recording of a certificate by Lessor shall [illegible] a forfeiture of such tenancy, and if the lessor so elects, but not otherwise, and within ten days notice of such election or any notice or demand whatsoever, Lessee shall immediately [illegible] the premises. Lessee's rights to be paramount, [illegible] terminated or not. Lessee's right to quiet [illegible] contained provided in [illegible], or [illegible] for rent, notice to quit or demand for possession of the premises whatsoever, and [illegible] Lessee [illegible] and from Lessee in order [illegible] to take possession of the premises, [illegible] excel and remove Lessee or any other person who may be occupying the said premises [illegible] or otherwise," etc.

The [illegible] be purchased the [illegible] paid the rent for [illegible] year, but did not [illegible] plaintiff twice demanded [illegible] he did not have the money; [illegible] the premises, [illegible] did not do this, but [illegible] trial.

The [illegible] would not pay the rent because [illegible] defendant was that in a conversation [illegible] part of [illegible] rent but rather [illegible] that be [illegible] Security, [illegible] defendant contended [illegible] upon the [illegible] month [illegible]

February, March and April. Plaintiff offered to accept the rent for January, February and March, and thereupon defendant tendered the amount of rent due for those three months in the sum of $105, which the plaintiff accepted.

On rebuttal one Andrews testified for plaintiff that he had a conversation with defendant in the latter part of February, 1925, in which defendant said that he had a place at Fifty-second and Wentworth which he was figuring on moving into; in fact, the witness said that he had told him that several times, and that defendant had a sign up in his window indicating that he was to move.

The plaintiff, in rebuttal, denied testimony of the defendant to the effect that in December, 1924, defendant had asked him for a lease, but on the contrary testified that defendant told him that he was going to move. He says that defendant gave him a check for the rent, which there wame not sufficient funds to meet; that defendant never offered to pay him rent for January, February and March, and never asked him about getting the lease extended, but promised to move. The plaintiff further testified that defendant never came to him and said that he would pay the rent and not pay the repair bill.

The court refused to find as a fact, as requested by defendant, that defendant told plaintiff in December, 1924, that he wished to continue the tenancy of the premises, and also refused to hold that in that month the defendant informed the plaintiff, in substance, that he wished to occupy the premises in question beyond the 2nd day of April, 1925, under the option in the lease, and refused to hold that the plaintiff stated to the defendant that defendant had no right to occupy the premises under the lease beyond April 2, 1925, or that plaintiff had refused to enter into negotiations, as requested by plaintiff, for an increase of the rent for

February, March and April. Plaintiff claimed [illegible] for January, February and March, and therefore defendant contended the amount of rent due for those three months in the sum of $[illegible], which the plaintiff accepted.

On redirect one Andrews testified for plaintiff that he had a conversation with defendant in the latter part of February, 1920, in which defendant said he had a claim of $[illegible] against Wentworth which he was figuring on moving into; in fact, the witness said that he had told him that several times, and that defendant had a claim in his window to [illegible] the move.

"A plaintiff", in rebuttal, testified to a conversation of the defendant in the office that in December, 1919, defendant had stated claim for a lease, but on the contrary testified that defendant said claim that he was going to move. [illegible] defendant [illegible] claim for the rent, which there was not any [illegible]; that defendant never offered to pay him rent for [illegible] and March, and never asked him about getting the lease extended, but [illegible] to move. The plaintiff [illegible] defendant [illegible] never came to his [illegible] and said he would pay the rent [illegible] the repair bill.

The court refused to find as a fact, [illegible] defendant, that defendant had the [illegible] in January, 1920, that he wished to continue the tenancy of the premises, and also refused to hold that in that month the defendant informed [illegible], in substance, that he wished to occupy the premises [illegible] the 2nd day of April, 1920, [illegible] that defendant had no right to retain the premises [illegible] April 4, 1920, or that [illegible] - [illegible] tions, we received by [illegible], for a [illegible]

the term of said lease, which might ensue after April 2, 1925, and refused further to hold that plaintiff had, as early as the month of December, 1924, proposed to establish an oil filling station on the property occupied by the defendant and, as a part of that intention, not to permit the defendant to occupy the premises after April 2, 1925, and communicated that intention to the defendant prior to that time.

The court also refused to hold, although requested, that the defendant was ready, able and willing to pay plaintiff the rent reserved by the lease, and that plaintiff had refused to accept it unless defendant also paid another demand, which defendant contested upon the merits.

The defendant submitted propositions of law, which were also refused by the court, and upon these rulings the defendant assigns errors. He contends here for the proposition that the mere holding over, after the expiration of the time specified in the lease, constituted an election on the part of defendant to hold for the additional or extended term, citing 35 Corpus Juris, p. 1036, Gusak v. Gunning, 109 Ill. App. 583, and other cases so holding.

We think, however, the ruling of the court upon the propositions of law become immaterial in view of the findings of fact. By the terms of the lease, the continuance of the same, not only for the extended term but for the prior term as well, depended upon the payment of the rent, and the finding of the court and its rulings upon the request to find matters of fact, indicate that it was the opinion of the court that the defendant had wrongfully failed to pay the rent reserved for more than three months prior to the expiration of the original term.

The defendant does not argue that the finding of the court is against the evidence, and it is therefore unnecessary to discuss the propositions of law.

The judgment is affirmed. AFFIRMED.

Johnston and McSurely, JJ., concur.

the term of well issues, which might arise after April 2, 1923, and returned further to hold that notwithstanding, on early in the month of December, 1924, proceeded to establish an oil drilling contract on the property included by the defendant [illegible], as a part of that insertion, not to permit the lessees to occupy the premises after April 2, 1923, and commenced that termination in the defendant prior to that time.

The court also refused to hold, although [illegible] that the defendant was [illegible], able and willing to pay liquidated the rent reserved by the lease, and that [illegible] to accept it unless accompanied also paid another demand, which defendant contested upon the merits.

The [illegible] subsidiary [illegible] of law, which were also raised by the court, and upon which [illegible] the defendant assigns error. We consider [illegible] that the mere holding over, [illegible] the lease, constituted [illegible] hold for the additional [illegible] Jones, 9. 2020, Lynch v. [illegible], [illegible] Ky. [illegible] holding.

The claim, however, [illegible] the court upon the proposition of law [illegible] in view of the [illegible] fact. By the terms of the lease, [illegible], but only for the [illegible] upon the payment of the rent, [illegible] and the taking upon the [illegible] of the [illegible] it, in view that in the [illegible] failed to pay the rent [illegible] the termination of the [illegible].

The judgment does not [illegible] the court in sustaining the [illegible] "[illegible] the [illegible] of [illegible]."

The judgment is affirmed.

Johnston and Assuming, [illegible], [illegible].

310 - 30572

MIDWESTERN COMPANY,
a corporation,
Appellee,

v.

WARSHAWSKY COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

240 I.A. 673

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $2000 entered upon the verdict of a jury, motions for a new trial in arrest of judgment having been overruled.

The statement of claim alleged that on November 24, 1922, plaintiff purchased from defendant an air compressor for the sum of $1200, paying upon the purchase price the sum of $200, the balance to be paid when the compressor was removed from defendant's warehouse; that when delivery was requested, the compressor had been sold.

The affidavit of merits alleged that it had been agreed that the compressor would be removed and the balance of $1000 paid within ten days; that defendant failed to comply with its agreement in these respects; although often requested; whereupon defendant sold the compressor at a reduced price.

Evidence was submitted by the parties tending to sustain their respective contentions, and the issues submitted to a jury, with the result above stated.

The evidence tended to show the sale of the compressor on November 24, 1922, and the payment of $200 on that date. There was a conflict in the evidence as to whether the compressor was to be paid for and removed within ten days, as alleged in the affidavit of merits. It was not denied that the air compressor

was resold to a man named Sanders in January, 1923, for $1000.

For several reasons, the judgment must be reversed. In the first place, there is no evidence upon which to base the damages allowed by the jury. The only evidence on that issue was given by one King, who testified that he was an industrial representative for Westinghouse Air Brake Co., and that in November, 1922, the list price of the National Brake & Electric Company's three-cylinder air compressor No. 537-A motor was $4500, usually sold under discount of ten per cent, making a net price of $4050, f.o.b. Milwaukee; that the same price existed in December, 1922, and January, 1923, and that he supposed the freight charge from Milwaukee to Chicago would be around $40 or $50; that he had possibly sold ten compressors at the price stated, but had never sold any in Chicago.

The real question at issue upon plaintiff's theory of the case was, What was the fair cash market value of the air compressor at Chicago, Illinois, at the time it was sold to Sanders? The evidence of the list price would not establish that fact. Cook County v. Harms, 10 Ill. App. 24, affirmed 108 Ill. 151. See also Fowler v. County Commissioners, 6 Allen 92.

Again, the court by the sixth instruction told the jury that if the jurors believed from the evidence that the defendant "wrongfully" neglected or refused or placed himself in such a position that he could not deliver the goods purchased by plaintiff, according to the contract, "then you should find the issues for the plaintiff." Where an instruction, as here, directs a verdict, it is well settled it must contain all the material facts and conditions essential to such a verdict. Pardridge v. Cutler, 168 Ill. 504; Illinois Iron & Metal Co. v. Weber, 196 Ill. 526. This instruction ignored the theory of the defense.

The instruction was erroneous, and the verdict of the

was remold to a man named Sanborn in January, 1911, for $1000.

For several reasons, the judgment must be reversed. In the first place, there is no evidence upon which to base the damages allowed by the jury. The only evidence on that issue was given by one King, who testified that he was an insurance representative for Washington [illegible] Co., and that in November, 1922, the last year of the Michigan-Wisconsin Aviation Company's three-cylinder air experience Co. Eaton's motor was [illegible], usually sold under discount of ten per cent, making a [illegible] of $4000. T.o.b. Milwaukee; that the [illegible] motors sold in October, 1922, and January, 1923, and that he supposed the freight charge from Milwaukee to Chicago would be [illegible] cent; that he had personally sold ten compressors of the price stated, but had never sold any in Chicago.

The real question at issue upon plaintiff's theory of the case was, but was the fair cash market value of the air compressor at Chicago, Illinois, at the time it was sold to defendant? The evidence of the last-quoted witness could not establish that fact. Cook County v. Harms, 1[illegible] Ill. App. 7[illegible], affirmed 1[illegible] Ill. 1[illegible]. See also Parker v. County Commissioners, 8 Allen 67.

Again, the court by the sixth instruction told the jury that if the jurors believed from the evidence that the defendant "wrongfully rejected or refused or failed [illegible] in such a position that he could not deliver the goods purchased by plaintiff," according to the contract, "then you should find [illegible] for the plaintiff." There is no instruction, [illegible], [illegible], it is well settled it was reversible error [illegible] tions essential to such a verdict. Lightning v. Wabash, 3[illegible] Ill. 3[illegible]; Illinois Iron & Metal Co. v. Smith, 1[illegible] Ill. 1[illegible]. [illegible] instruction ignored the theory of the defense.

The instruction [illegible] reversible, and the verdict of the

jury, particularly as to the amount of the damages, is clearly against the weight of the evidence.

For the errors indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McHurely, JJ., concur.

319 - 30581

SEYMOUR E. HENIKOFF et al.,
(Complainants),

vs.

JOSEPH LAVIN et al.,
(Defendants).

MAX GOLDMAN,
(Cross-Complainant),
Appellee,

vs.

SEYMOUR E. HENIKOFF et al.,
(Cross-Defendants).

On Appeal of JOSEPH LAVIN,
Appellant.

240 I.A. 673

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

By this appeal Joseph Lavin, cross-defendant below, seeks the reversal of certain parts of the decree entered.

The cause was heard by the Chancellor upon exceptions to the report of a master in chancery, to whom it had been referred. The decree does not expressly over-rule the findings of the master or sustain the exceptions thereto, but is, nevertheless, contrary to these findings and recommendations.

The bill of complaint was filed by Seymour E. Henikoff and Horace Kish, who on January 10, 1923, by warranty deed executed by Andreas Clausen took title to certain real estate described in the bill.

The bill makes Joseph Lavin and Max Goldman defendants thereto, alleging that they had caused certain contracts for the sale of the real estate in question to be recordedin the recorder's office of Cook County, Illinois, thus clouding the title of com-

plainant.

The bill prayed that these clouds might be removed. Defendants answered, denying the equity of the bill, and replications were filed.

Thereafter defendant Goldman filed a cross-bill, in which he alleged that a contract had theretofore been made between Lavin and himself whereby Lavin agreed to sell and Goldman to buy said real estate. He alleged that he at all times had been ready, able and willing to comply with the contract and prayed an accounting. Complainants Foreman Trust & Savings Bank, under the name of Foreman Brothers Banking Company, Andreas Clausen and Joseph Lavin were made defendants to the cross-bill. The Bank answered, admitting that the sum of $1,000 had been deposited with it pursuant to a certain contract between Lavin and Goldman, and that it was holding the money and was ready to pay it to such person as the court might direct.

Lavin answered admitting the execution of the contract with Goldman and denying the other allegations of the cross-bill and asserting that Goldman by his default had forfeited the $1,000 deposited with the bank. The complainants answered, disclaiming any interest in the matters set up in the cross-bill.

The master found that Clausen on January 10, 1923, was the owner of the real estate described; that on that date he sold and conveyed it to Henikoff and Mish, that the deed had been recorded, that complainants had since that date been in possession of the premises, collecting the rents and paying interest on the incumbrances; that Andreas Clausen and Joseph Lavin entered into a contract under date of October 22, 1922, which was recorded in the recorder's office of Cook County on November 21, 1922, by which Clausen agreed to sell and Lavin to buy the premises; that on November 22, 1922, Joseph Lavin and Max Goldman entered into a

plaintiffs.

[illegible]

[illegible]

claims were [illegible]

[illegible]

which he [illegible]

Lewis and [illegible]

well [illegible]

also and [illegible]

[illegible]

Peterson [illegible]

were [illegible]

[illegible]

a certain [illegible]

[illegible]

might [illegible]

[illegible]

with [illegible]

and [illegible]

[illegible]

any [illegible]

[illegible]

the [illegible]

and [illegible]

[illegible]

the [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

contract for the sale by Lavin and the purchase by Goldman of the said premises, and that Goldman caused this contract to be recorded in the office of the recorder of deeds of Cook County on December 13, 1922; that Clausen and Lavin were able, ready and willing to comply with the contracts made by them, and that it was not until January 5, 1923, that Lavin notified Clausen that his contract with Goldman could not be completed, and thereupon Andreas Clausen consummated the deal with the complainants; that after Lavin entered into the contract with Goldman on November 22, 1922, he delivered to Goldman the abstract of title covering the premises involved in the contract; that this abstract of title was examined by the attorney representing Goldman, who advised that it was satisfactory; that subsequently a number of conferences were had between the parties representing Lavin and Goldman relative to the closing of the deal, and that several times between November 22, 1922, and January 5, 1923, Goldman advised Lavin, or his representatives, that he, Goldman, would not close the deal with Lavin because he thought Lavin was making too much money on the transaction; that the contract between Lavin and Goldman was made subject to the contract between Lavin and Clausen, and that under the terms of the Lavin-Goldman contract Goldman deposited with the bank the sum of $1,000 as earnest money, which is still held by the bank under the terms and provisions of a contract between Goldman and Lavin; that the contract between Goldman and Lavin contains the provision, "In case of any controversy regarding the same the said bank shall be entitled to reimburse itself out of said enclosure, or the proceeds thereof, for any and all costs, attorneys' fees and other expenses which they may have incurred or become liable for on account thereof." And a further provision, "Should said purchaser fail to perform this contract

contract for the sale of Lavin [illegible] by [illegible] of the said premises, and [illegible] to be recorded in the office of the register [illegible] on December 13, 1923; that [illegible] and willing to comply with the contract made by [illegible], that it was not until January 8, 1924, that Lavin [illegible] that his equipment with oil and coal [illegible], and [illegible] address [illegible]; that after Lavin entered into [illegible] on October 22, 1923, he [illegible] the [illegible] the premises involved in the contract; [illegible] was examined by the military [illegible] that it was [illegible] were had between the parties [illegible] tive to the closing of the deal, [illegible] November 22, 1923, and [illegible] his testimony, [illegible] with Lavin [illegible] the two sections; that [illegible] made [illegible] under the terms of [illegible] with the back [illegible] held by the [illegible] between [illegible] basis [illegible] ing [illegible] per of said [illegible], [illegible] [illegible] incurred or [illegible] [illegible] operation, "[illegible] said [illegible] [illegible]

promptly on his part, at the time and in the manner herein specified the earnest money paid as above shall, at the option of the vendor, be retained by the vendor as liquidated damages, and this contract shall thereupon become and be null and void. Time is the essence of this contract, and of all the conditions hereof."

The contract further contains this provision: "This contract is subject to an existing contract between the seller and Andreas Clausen dated October 20, 1922, and it is agreed that both contracts will be closed simultaneously; that the deed shall run direct to purchaser mentioned herein and that purchase price shall be paid out by purchaser mentioned herein. However, a quitclaim deed will be furnished by the said Joseph Lavin."

The master further found that between November 22, 1922, and January 5, 1923, Lavin was at all times ready, willing and able to complete his contract with Goldman; that Goldman made default in his obligations under said contract, and that by reason thereof Goldman had forfeited to Lavin the earnest money deposited with the bank, and that Lavin was entitled to that sum of money, less the expenses of the escrow agent as found; that the contracts were clouds upon the title, which should be removed; that the expenses of the bank should be allowed in the sum of $103.

Prior to the entry of the decree the parties filed a stipulation to the effect that the answer of the bank should be treated as a bill of interpleader, and that the cross-bill and the several answers of Nenikoff, Mish and Lavin should be treated as several answers to this bill, and that the evidence returned by the master should be held to be evidence on the issues thus made up, and that the bank was entitled to retain the sum of $103, as found by the master.

The decree recites the pleadings and the stipulation of the parties, removes the contracts from the record as clouds

promptly on his part, as the site on [illegible] Lorain [illegible] [illegible]-
tind the general money paid on account [illegible], or the option of the
vendor, be retained by the vendor as liquidated damages, and this
contract shall thereupon become null and void. This is
the essence of this contract, and of all the [illegible] hereof."

The contract therein recited is substantial. Such
contract is signed (as well as by earnest money receipt) by Andrew
Andrews Blanson [illegible] Contract [illegible] [illegible] [illegible]
contracts will be closed [illegible] [illegible]
direct to purchaser [illegible] [illegible] [illegible] [illegible]
be paid out of mortgage [illegible] proceeds. However, a [illegible]
deed will be furnished by [illegible] [illegible].

The case [illegible] [illegible] [illegible] [illegible] 27,
1922, and January 3, 1923, [illegible] was at all times ready, willing
and able to complete his contract with [illegible]; but [illegible] made
default in his obligation [illegible] [illegible], [illegible] by [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
with the bank, and that [illegible] [illegible] [illegible] [illegible]
[illegible] the expiration of the [illegible] [illegible] [illegible]
were closed [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] of the [illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible] [illegible]
stipulation in the [illegible] [illegible] [illegible] [illegible]
treated as a [illegible] [illegible] [illegible] [illegible]
the general [illegible] [illegible] [illegible] [illegible]
as several [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
up, [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] [illegible]
of the [illegible] [illegible] [illegible] [illegible]

upon the title of complainants, and makes the following finding supplementary to or inconsistent with the report of the master:

> "That at no time was Joseph Lavin possessed of title to the said premises; that he was at no time on or previous to January 10, 1923, prepared to convey or tender a deed to the said premises, and he did not tender a deed of conveyance to the said Max Goldman, nor fix any time within which he would require the said Max Goldman to perform his contract, upon penalty of forfeiture in case of his failure therein, and that said Max Goldman is entitled to said money in escrow as aforesaid."

In accordance with and in conformity to that finding, the decree directed that the sum of $897, held in escrow by the Bank was the property and money of Goldman, and the Bank was ordered to pay the sum over to him. It is this provision of the decree that cross-defendant Lavin seeks to have reversed.

The finding of the master to the effect that Goldman had refused to go through with the deal with Lavin because he thought Lavin was making too much money on the transaction, is not over-ruled or exception thereto sustained by the Chancellor.

Lavin argues here that this finding of fact not being contradicted, the tender of a deed was unnecessary on his part.

That a refusal of the purchaser to perform, or his notification to the vendor that he is unable to perform, relieves the vendor of the necessity of tendering a deed, seems to be the general rule. (39 Cyc, 1377).

The law does not require the performance of an idle act or one which would be useless. Bucklen v. Hasterlick, 155 Ill. 423. This rule is not limited, as cross-complainant supposes, to specific performance of contracts. Where one party refuses to perform and the other is anxious, ready and willing to perform, a tender of an abstract or guaranty policy is unnecessary. Lyman v. Gedney, 114 Ill., 388.

upon the title of ocean in any [illegible]

supplementary or [illegible]

> "That at no time was Joseph Lavin possessed of title in the said premises; that he was at no time [illegible] up to January 11, 1917, [illegible] to convey [illegible] said premises, and he did not tender a deed of conveyance to the said Ben Holman, nor at any time [illegible] require the said Ben Holman to perform his contract, upon penalty of forfeiture [illegible] said Ben Holman is entitled to said money [illegible] as aforesaid."

In accordance with [illegible] ing, the Court [illegible] the act of 1917, [illegible] the Bank was the property and money of [illegible] ordered to pay the sum over to him. [illegible] decree that cross-defendant Lavin seeks to have reversed.

The finding of [illegible] had refused to [illegible] he thought Lavin was seeking [illegible] the transaction, is not overruled or [illegible] cation.

Lavin argues [illegible] being [illegible] part.

It is a [illegible] notification [illegible] the [illegible] general [illegible]

The law [illegible] and or [illegible] Ill. 483. [illegible] a specific performance of contracts. [illegible] perform [illegible] tender [illegible] velings, 116 Ill., [illegible]

The record, we think, sustains the findings of the master. Even Goldman's cross-bill asserts that he has demanded repayment of the money and charges the perpetration of a fraud upon defendant, of which there is no proof in the record. The alleged fraud set up in the cross-bill was that Lavin had told defendant that he was to pay $14,000 for the real estate, while as a matter of fact he was to pay only $13,000 for it, but the record is destitute of evidence tending to prove any such representation was made.

There is, therefore, no evidence in the record upon which to base the finding of the decree to which Lavin objects, nor is the finding of the decree that Lavin did not acquire title a sufficient basis for the order since the contract between Lavin and Goldman provided that the two contracts would be closed simultaneously, and that the deed should run direct to the purchaser, Lavin, however, furnishing a quit-claim deed. Moreover, Goldman never based his refusal to carry out the contract upon that ground. Lang v. Redenberg, 277 Ill., 368.

The recommendation of the master's report was right, and that part of the decree which directed the money in the hands of the bank to be turned over to Goldman not being sustained by the evidence, the decree is reversed and the cause remanded with directions to enter a decree in accordance with the recommendation of the master.

REVERSED AND REMANDED WITH DIRECTIONS.

Johnston and McSurely, JJ., concur.

The record, [illegible], contains the [illegible] matter. Upon Stalker's cross-bill [illegible] engagement of the money and thereby the impoverishment of a friend upon defendant, [illegible] alleged fraud are up in the cross-bill [illegible] defendant [illegible] as a motive of [illegible] record is destitute of evidence [illegible] presumptation [illegible].

There is, [illegible] which to base the [illegible] mer is the further [illegible] a sufficient basis [illegible] and Coleman [illegible] almost necessarily, [illegible] chaser. Davis, however, [illegible] Coleman never [illegible] ground. Smith v. Hartshorne, [illegible].

The [illegible] and that part of the [illegible] of the bank [illegible] the evidence, his [illegible] directions [illegible] of the [illegible].

[illegible]

Johnson and [illegible], [illegible].

365 - 30627

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN PETRILA,
Appellee,

v.

CITY OF CHICAGO, a municipal corporation, WILLIAM E. DEVER, Mayor of the City of Chicago, AL F GORMAN, City Clerk of the City of Chicago, THOMAS P. KEANE, City Collector of the City of Chicago, and MORGAN A. COLLINS, General Superintendent of Police of the City of Chicago,
Appellants.

240 I.A. 673

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, the City of Chicago and certain of its officers, from an order and judgment directing the issuance of the writ of mandamus, as prayed for in the relator's petition. The cause was heard upon the relator's second amended petition and the answer of the respondents thereto, a jury being waived and the cause submitted to the court. The relator has not appeared in this court to sustain the judgment.

The only evidence offered in behalf of the petitioner upon the hearing was that which he gave in his own behalf. In reply to questions by the court, he stated that he was the owner of the building involved, which was a two-story brick structure; that he intended to run a soft drink parlor; that he was not going to sell any drinks or moonshine or anything; that he had a license at one time; "they searched the first floor and the basement and found some stuff; never closed the place; they had search warrant for first flat and basement."

In response to questions from his attorney, the relator stated further that there was a store in the front, and they didn't arrest him but arrested his wife; that he was not in Chicago

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOHN PRINGLE,
Appellee,

v.

CITY OF CHICAGO, a municipal
corporation, WILLIAM J. LYNCH,
Mayor of the City of Chicago,
AB T. BOREMAN, City Clerk of the
City of Chicago, THOMAS E. WOODS,
City Collector of the City of
Chicago, and NORMAN A. COLLINS,
General Superintendent of Police of
the City of Chicago,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, the City of Chicago and certain of its officers, from an order and judgment directing the issuance of the writ of mandamus, as prayed for in the relator's petition. The cause was heard upon the relator's second amended petition and the answer of the respondents thereto, a jury being waived and the court [illegible] the facts. The relator has not appealed in this case [illegible] the facts.

The only evidence offered in behalf of the [illegible] upon the hearing was that which he gave in his own behalf. In reply to questions by the court, he stated that he was [illegible] of the building involved, which was [illegible]; that he intended to run a cafe during [illegible]; that he [illegible] to sell any drinks or refreshments or anything; [illegible] at one time; "they [illegible] [illegible] found some stuff; [illegible] for first [illegible]."

In response to questions from counsel [illegible] stated further that there was [illegible] [illegible]

at that time; that she was not fined. * * * * When the police searched the place they found nothing being sold; the time of the search when police officers found stuff in rear I didn't live in flat in question, but rented same; I have filed my application for license."

The answer of the defendants to the petition denied that the petitioner was a person of good moral character and reputation, and asserted that on October 9, 1923, police officers of the City of Chicago found intoxicating liquors in the premises and in the possession of said petitioner, which he kept in connection with his business and for the purpose of sale, in violation of the city ordinances of the City of Chicago and the statutes of the State of Illinois, in such case made and provided; that such facts having been presented to the Mayor, petitioner's license was revoked in accordance with the provisions of the ordinance hereinbefore referred to, and that because of such facts, the petitioner is not a fit and suitable person to have a license.

The relator did not file any replication to the answer, and under well settled rules of pleading in this condition of the record material facts averred in the answer are admitted on the record. Simmons v. Jenkins, Admr., 76 Ill. 479; People v. City of Rock Island, 215 Ill. 491.

It is well settled that the writ of mandamus only issues where the petitioner has a clear legal right to have the thing done which he requests, and that the request will be denied when the right of the petitioner is doubtful.

There was no evidence offered other than that which we have recited to sustain the allegations of the petitions. This evidence was wholly insufficient.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

at that time; that she was not tired. " * * * When the police
searched, the place they found nothing being sold; the time of
the search when police officers found stuff in your I didn't
live in flat in question, we rented some; I have filed my
application for license."

The answer of the defendants to the petition denied
that the petitioner was a person of good moral character and
reputation, and asserted that on October 9, 1937, police officers
of the City of Chicago found intoxicating liquors in the premises
and in the possession of said petitioner, which he kept in
connection with his business and for the purpose of sale, in
violation of the city ordinances of the City of Chicago and the
statutes of the State of Illinois, in such case made and provided;
that such facts having been presented to the Liquor Commissioner,
license was revoked in accordance with the provisions of the
ordinance hereinbefore referred to, and that because of such
facts, the petitioner is not a fit and suitable person to have a
license.

The relator did not file any replication to the answer,
and under well settled rules of pleading in this jurisdiction of the
record material facts averred in the answer are admitted on the
record. Bluemoon v. Zemanek, supra, 7 Ill. 2d; Lundin v. Liquor
Commissioner of Rock Island, 410 Ill. 407.

It is well settled in this jurisdiction that mere possession of
liquor where the petitioner has not been in violation of the
liquor laws which he relates, and in the absence of evidence
when the right of the petitioner is contested.

There was no evidence adduced other than the pleadings or
have resulted to the City Liquor Commissioner of the City of Chicago. The
evidence was wholly ex parte.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Jackson and Scanlan, JJ., concur.

446 - 30710

PEARL W. CHAVERS,
Appellee,

vs.

RICHARD HILL, Jr.,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 674

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Richard Hill, Jr., from a judgment in the sum of $5,000, entered against him and in favor of the plaintiff in an action on the case for malicious prosecution.

The plaintiff sued with the defendant, Hill, Anthony Overton, Robert R. Jackson, S. A. T. Watkins, Edward S. Miller, and John W. Robinson, and alleged in the first count of his declaration that he was a good and honest citizen of the state and had never before been suspected of having been guilty of the confidence game or receiving deposits in the bank after the same was known by him to be insolvent, but that the defendants, contriving and maliciously intending to injure him in his good name and to bring him into public scandal and disgrace, and to impair his financial standing and good credit among his business associates, on the 26th day of January, 1923, falsely and maliciously conspired to and did procure one Elsie Green to and that she did appear before one of the judges of the Municipal court, and falsely and maliciously and without any reasonable or probable cause whatever, charge the plaintiff with having feloniously instigated and carried on a confidence game, and thereby procured a warrant for the apprehension of plaintiff and procured him to be arrested and imprisoned and kept in prison for the space of three hours; that on a hearing before

No. 5070.

PEARL W. CHAVERS, Appellant,	
vs.	
RICHARD MEIS, Jr., Appellant.	

Appeal from the Supreme Court of the State of Washington.

[illegible]

[illegible] Jr., from a judgment in the sum of $5,000, entered against him on a verdict in favor of the plaintiff in an action [illegible] for malicious prosecution.

The plaintiff [illegible] defendant, [illegible], and Overton, Dubois v. [illegible], [illegible], [illegible], and John W. Robinson, [illegible] that he was a good [illegible] before been suspected of [illegible] game or receiving stolen [illegible] him to be innocent, [illegible] wholly improper to [illegible] into public [illegible] something was good or [illegible] 25th day of January, [illegible] and did [illegible] one of the jurors [illegible] and without any [illegible] plaintiff with [illegible] fidence [illegible] of plaintiff and [illegible] in prison for the [illegible]

one of the judges he was, on March 30, 1923, adjudged not to be guilty of the supposed offense.

The second count charges that on February 1, 1923, in the City of Chicago and Cook County, the defendants falsely and maliciously, and without any reasonable or probable cause, conspired to procure and to induce, and did induce, persuade and direct, one Jim Thornton to charge, and he did charge, the plaintiff with having committed the offense of receiving deposits while a bank was insolvent, knowing the same to be insolvent, and falsely and maliciously caused plaintiff to be arrested and imprisoned, and that of this charge he was fully acquitted on March 30, 1923.

The defendants filed a plea of not guilty, and at the close of all the evidence the court instructed the jury to find the defendants Overton, Jackson, Watkins, Miller and Robinson not guilty, and such verdict was accordingly returned as to these defendants. A verdict was returned finding defendant Hill, Jr., guilty.

Motion by defendant, Hill, to set aside the verdict and grant a new trial in arrest of judgment being over-ruled, judgment was entered on the verdict.

The plaintiff has not appeared in this court to support the judgment. The defendant has stated and argued quite at length and with numerous citations of authorities, fifteen points, any one of which, if sustained, would be sufficient to reverse this judgment.

As both counts were based upon the theory of a conspiracy, naming the known alleged conspirators, it is indeed difficult to understand upon what theory only one defendant could have been found guilty. We understand the law to be that it is impossible for a person to conspire with himself. At least two persons are necessary to bring a conspiracy into being. Heaps v. Dunham et al., 95 Ill., 586.

Again, the record fails to disclose proof of malice, and the evidence indicates to our minds that there was probable cause for believing the plaintiff guilty of the offenses with which he was charged. Glenn v. Lawrence, 280 Ill. 581.

We think the court erred in receiving in evidence the record of the criminal proceedings, without the same being limited to the purpose of showing that these proceedings had terminated. Skidmore v. Bricker, 77 Ill., 164; Gentzen v. H. M. Hooker Co., 173 Ill. App., 127; Tumulty v. Parker, 100 Ill. App. 382; Anderson v. Fletcher, 228 Ill. App. 372.

Again, the attorney for the plaintiff was permitted, over defendant's objection, to state as facts material matters which were not in evidence. Chicago Union Traction Company v. Adam Lauth, 216 Ill., 176; Rost v. Noble & Co., 316 Ill., 357.

It will be unnecessary to consider numerous other errors which are pointed out. For those indicated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

Again, the record fails to disclose any [illegible] and the evidence indicates to our minds that there was probable cause for believing the plaintiff guilty of the offenses with which he was charged. Gilson v. Lawrence, 295 Ill. 501.

We think the court erred in [illegible] the record of the criminal proceedings, although the case being limited to the purpose of showing that some proceedings had terminated. Williams v. Gilman, 77 Ill., 544; Dunlap v. H. M. Kohler Co., 172 Ill. App., 1-7; Lundgren v. Larson, [illegible] App. 586; Anderson v. Wisdom, 204 Ill. App. 376.

Again, the admission of the plaintiff's testimony over defendant's objection, to state as facts material matters which were not in evidence, [illegible] v. Allen Lewis, 216 Ill., 170; Hay v. [illegible], [illegible] .. 154.

It will be unnecessary to consider the numerous other errors which are pointed out. [illegible] reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and Mulroney, JJ., concur.

455 - 30719

FINANCIAL SECURITIES CORPORATION,
Appellee,

vs.

OTTO LANGOS, Doing Business as
LANGOS ELECTRIC & MANUFACTURING
COMPANY, (Not Inc.)
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 674

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from an order denying the motion of defendant to vacate a judgment theretofore entered upon certain judgment notes. These notes were thirty-five in number, all dated May 15, 1924, and were for the sum of $50 each, except the last note, which was for the sum of $111.42. The notes became due one each month beginning July 12, 1924, were payable to the "LaSalle Machinery Exchange," and secured by a chattel mortgage. These notes were endorsed without recourse by the "La Salle Machinery Exchange" as payable to the order of the plaintiff.

Judgment was entered on January 8, 1925, for $1,172.05 and $150 attorney's fees. On January 28, 1925, the defendant presented its motion and affidavit in support thereof to vacate the judgment.

The affidavit in support of the motion stated that defendant first learned of the entry of the judgment against him on January 14, 1925, when an execution issued on the judgment and was served upon him, and that the day following said service he retained an attorney to act for him.

The affidavit states the fact to be that on or about May 15, 1924, the defendant purchased of the LaSalle Machinery Ex-

FIRAMOLIN SECURITIES CORPORATION, Appellee,	AMERICAN MOON BUILDING SUNT CO OF TEXAS.
vs.	
OTTO LANGOS, Doing Business as LANGOS ELECTRIC & MANUFACTURING COMPANY, (Not Inc.) Appellee.	

240 U.S. 574

MR. JUSTICE DOUGLAS DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment denying the motion of defendant to vacate a judgment theretofore entered upon certain judgment notes. These notes were thirty-five in number, all dated May 15, 1924, and were for the sum of $[illegible] each, except the first note, which was for the sum of $[illegible]. The notes bonded the obligor [illegible] May 15, 1924, were payable to the "Lonsdale Manufacturing Company," and secured by a chattel mortgage. These notes were endorsed without recourse by the "Lonsdale Manufacturing Company" to the order of the plaintiff.

Judgment was entered on January 5, 1925, for $1,122.02 and $150 attorney's fees. On January 26, 1926, the defendant presented its motion and affidavit in support thereof to vacate the judgment.

The affidavit in [illegible] of the motion stated that defendant first learned of the entry of the judgment against him on January 14, 1925, when an execution issued on the judgment was served upon him, and that the day following was spent in retaining an attorney to act for him.

The affidavit states that [illegible] to be not in or about May 15, 1924, the notes were purchased [illegible] the Lonsdale Manufacturing

change, the payee named in the notes, at the wholesale price of $2100, certain new machinery and paid on the purchase price $350, and executed and delivered to said LaSalle Machine Exchange, vendor, the thirty-five notes mentioned in the suit for the balance of the purchase price, and to secure the notes executed and delivered to the vendor a chattel mortgage on the machinery; that thereafter, on or about September 20, 1924, and before any of said machinery had been used, defendant (then having no use for said machinery) and said vendor (who was then and there the bona fide owner and holder of said notes and chattel mortgage) entered into an oral agreement whereby defendant was to and then did deliver to said vendor said machinery, together with other new machinery owned by the defendant, in full satisfaction and payment of the notes mentioned in this suit, and said notes were to be cancelled by said vendor and destroyed, and defendant relying on said vendor complying with said agreement supposed said notes and chattel mortgage had been cancelled and destroyed, until served with said execution; that in a discussion just prior to said agreement between defendant and said vendor, each stated to the other that as said $2100 was at a wholesale price and said machinery being new and unused, the said vendor would be able to dispose of the machinery at a price in excess of $2100, and in further consideration said vendor would accept and cancel said notes, and said defendant would allow said vendor all he got from the sale of said machinery (if he sold the same) in excess of $1750, the unpaid balance on said machinery; "that the plaintiff herein is no other than said payee named in said note operating under a different name; that plaintiffs are not the bona fide owners and holders of said notes to confess judgment thereon; that said payee placed said notes as collateral security for its loan from plaintiff only, and not as a sale of said notes to plaintiff by said vendor, notwithstanding

change, the payee named in the notes, at the alternative price of 1250, certain new machinery and gold on the purchase price 1330, and received and delivered to said defendant the machinery, vendor, the chattels-mortgage notes mentioned in the suit for the balance of the purchase price, and in return for said notes executed and delivered to the vendor a mortgage covering on the same property, that instrument, on or about September 26, 1924, and before any of said machinery had been used, defendant (from failing to use for said machinery) and said vendor (who was an [illegible] of [illegible] under and holder of said notes and chattel mortgage) entered into an oral agreement whereby defendant was to pay the old mortgage to said vendor and machinery, legal to with other new machinery owned by the defendant, in full satisfaction and payment of the notes mentioned in the suit, and said notes were to be cancelled by said vendor and delivered, and defendant relying on said vendor complying with said agreement executed said notes and chattel mortgage had been cancelled and delivered, leaving with said transaction; that in a transaction just prior to said agreement between defendant and said vendor, said [illegible] of the [illegible] of said $1800 was at a reasonable price and said machinery [illegible] was unused, the said vendor made [illegible] to sign a [illegible] machinery at a price in excess of $1800, and in such a transaction said vendor newly [illegible] the [illegible] water, and said defendant would sign said vendor all [illegible] (If he said the same) in excess of $1800, the [illegible] issued on said machinery; that the plaintiff herein is an [illegible] and payee named in said note [illegible] a [illegible] and; that plaintiff was not the home [illegible] and holders of said notes to confess judgment thereon; that [illegible] said notes as collateral security for the loan from plaintiff bank, and not as a sale of said notes to plaintiff by said vendor, in [illegible]

the purported endorsement on said notes to the contrary.

The statement in this affidavit as to the facts in regard to the agreement for the delivery of the machinery and the cancellation of the notes, is further corroborated by the affidavits of two witnesses, and these affidavits also were presented in support of the motion.

While it is true that affidavits of this character are to be construed most strongly against the party making application, (Chicago Fire Proofing Co. et al. v. Park National Bank, 145 Ill. 481) we think this affidavit set up matter which, if true, would constitute a complete defense to the notes.

It does not appear from the notes, nor otherwise from the record, what the "LaSalle Machinery Exchange" is, and while the plaintiff is a corporation the affidavit alleges that it is not the bona fide owner and holder of the notes, and that the payee and plaintiff are one and the same person. If so, then the notes are subject to the defense set up in the affidavit.

For the reasons indicated the judgment denying defendant's motion will be reversed and the cause remanded.

REVERSED AND REMANDED.

Johnston and McSurely, JJ., concur.

the purported endorsement on such notes is the contrary.

The statement in this affidavit as to the facts in regard to the agreement for the delivery of the machinery and the cancellation of the notes, is further corroborated by the affidavits of two witnesses, and these affidavits also were transmitted in support of the motion.

While it is true that affidavits of this character are to be construed most strongly against the party making application, (Chicago City Railway Co. v. Cook National Bank, 149 Ill. 121) we think this affidavit set up matter which, if true, would constitute a complete defense to the notes.

It does not appear from the notes, nor from the record, that the "Gasoline Engine Company" is, and while the plaintiff is a corporation the affidavit alleges that it is not the bona fide owner and holder of the notes, and that the payee and plaintiff are one and the same person. If so, then the notes are subject to the defense set up in the affidavit.

For the reasons indicated the judgment herein against defendant's motion will be reversed and the cause remanded.

REVERSED AND REMANDED.

Hammond and Rosenberry, JJ., concur.

472 - 30736

30736

HERMAN C. STRUVE,
Appellee,

v.

MICHAEL PISSANI,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 674

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in favor of plaintiff in an action in forcible detainer. The trial was by the court without a jury.

It is contended by the defendant that the notice given by plaintiff was insufficient to terminate the tenancy, and this is the controlling question on the record.

The evidence shows that defendant entered into possession of the premises under a written lease by which plaintiff demised the same to him for a period beginning on October 1, 1913, and ending on April 30, 1916, the total rent being $3100, which was to be paid in monthly installments of $100 each.

When this original lease expired on April 30, 1916, the defendant remained in possession of the premises, apparently, under an oral arrangement, by which, in addition to the space theretofore occupied, he was given a little more room in another building and for these two premises, he paid a rental of $130 per month. That arrangement continued until about 1922 when defendant gave up the additional space and thenceforth paid a rental of $100 per month. There was no written lease between the parties other than that originally made.

On February 18, 1925, plaintiff, landlord, caused to be served upon defendant the following notice:

HERMAN C. STEVEN,

Appellee,

v.

MICHAEL FIGLEWI,

Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MCCULLOUGH

DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment entered in favor of plaintiff in an action in replevin, trial by court. The trial was by the court without a jury.

It is contended by the defendant that the notice given by plaintiff was insufficient to terminate the tenancy, and this is the controlling question in the record.

The evidence shows that defendant entered into possession of the premises under a written lease by which plaintiff demised the same to him for a period beginning on October 1, 1952, and ending on April 30, 1953, the rent being $45.00, which was to be paid in monthly in advance of the 10th day.

Upon this original lease expiring on April 30, 1953, the defendant remained in possession of the premises, apparently under an oral arrangement. In addition to the rent therefore occupied, he was given a little more than the entire building and for those the premises, he paid a rent of $50 per month. That arrangement continued until about June 1955 when defendant gave up the additional space and thereafter paid a rental of $100 per month. There was no written lease between the parties other than the original one.

On February 15, 1955, plaintiff, landlord, caused to be served upon defendant the following notice:

"NOTICE OF TERMINATION OF TENANCY

To Michael Pissani:

You are hereby notified, that I have elected to terminate your tenancy by virtue of which you now occupy, as my tenant, the following described premises, to-wit: The entire premises known as 3153 Lincoln Avenue, together with all woodsheds, outbuildings, garages and barns belonging thereto, situated in the City of Chicago, County of Cook and State of Illinois. And you are hereby further notified, to quit and deliver up the possession of said premises to me at the end of the present term, provided sixty days intervene, otherwise at the end of the Sixty day term, which commences next after the service of this notice. You are therefore hereby accordingly required to surrender the possession of the within premises to me on the 30th day of April, 1925. Dated this 18th day of February, A. D. 1925.

(Signed) Herman C. Struve, Landlord."

It is the contention of the defendant that the tenancy created was one from year to year, while the plaintiff contends that the tenancy was one of month to month.

At the time of the service of this notice, an act to amend Sections 2 and 6 of an act to revise the law of landlord and tenant, approved May 1, 1873, as amended, approved June 27, 1923, was in force. See Laws of Illinois, Fifty-Third General Assembly, 1923, page 428. It provided: "In all cases of tenancy by the month, or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by sixty days' notice in writing, until July 1, 1925, and thereafter by thirty days' notice, in writing, and to maintain an action for forcible detainer or ejectment."

The notice at that time necessary in order to terminate a tenancy from month to month is set forth in Section 5 of the Landlord and Tenant Act, Smith-Hurd's Illinois Revised Statutes, 1925, Chapter 80, page 1609. It is as follows: "In all cases of tenancy from year to year, sixty days' notice in writing shall be sufficient to terminate the tenancy at the end of the year. The notice may be given at any time within four months preceding the last sixty days of the year."

"NOTICE OF TERMINATION OF TENANCY

To Michael Pisanti:

You are hereby notified, that I have elected to terminate your tenancy by virtue of which you now occupy, as my tenant, the following described premises, to-wit: the entire premises known as 3183 Lincoln Avenue, together with all woodshed, outbuildings, garages and barns belonging thereto, situated in the City of Chicago, County of Cook and State of Illinois. And you are hereby further notified, to quit and deliver up the possession of said premises to me at the end of the present term, monthly sixty days thereafter, otherwise at the end of the sixty day term, which commences next after the service of this notice. You are therefore hereby accordingly required to surrender the possession of the within premises to me on the 30th day of April, 1973. Dated this 15th day of February, A. D. 1973.

(Signed) Herman C. Kunze, Landlord."

It is the contention of the defendants that the tenancy created was one from year to year, while the plaintiff contends that the tenancy was one of month to month.

At the time of the service of this notice, as set forth in paragraphs 2 and 4 of the complaint, the law of landlord and tenant, approved July 1, 1874, as amended, approved June 27, 1969, was in force. See Ill. Rev. Stat. 1969, Sixty-Third General Assembly, 1969, page 1[illegible]. It provides: "In all cases of tenancy by the month, or for any other term less than one year, where the tenant holds over without special agreement, the landlord shall have the right to terminate the tenancy by giving such tenant notice in writing, until July 1, 1974, and thereafter by thirty days' notice, in writing, and to maintain an action for terrible detainer or ejectment."

The notice at issue was necessary in order to terminate a tenancy from month to month in set forth in Section 3 of the Landlord and Tenant Act, and which, Illinois Revised Statutes, 1969, Chapter 80, page 1[illegible], 1, is as follows: "In all cases of tenancy from year to year, where such notice in writing shall be sufficient to terminate the tenancy at the end of the year, the notice may be given at any time within four months, preceding the last sixty days of the year."

Comparing the notice with the provisions of the statutes it would seem that whether we consider the tenancy created by the acts of the parties here was one from year to year or from month to month, the notice served was sufficient in form and was served at a time which complied with the requirements.

The judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

Comparing the total with the stated sum of the
estimates it would seem that [illegible] the money
expended by the end of the [illegible] year in
year or two until it [illegible]. The motive power was sufficient
in fact one [illegible] which [illegible] complied with the
requirements.

The [illegible] to [illegible].

[illegible].

500 - 30764

30 Re

LESLIE A. JOHNSON,
Appellee,

vs.

BLAUER AND GOLDSTONE COMPANY,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 674

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by the defendant from a judgment in the sum of $952.90, entered upon the finding of the court.

The statement of claim alleged a verbal agreement between plaintiff and defendant, whereby plaintiff was to conduct an advertising campaign at a cost, for the services of the plaintiff and for work and material to be furnished to the defendant and bills to be presented as the work progressed, of not to exceed $2500. It was alleged that plaintiff incurred an expense of $512.14 and also furnished material and labor of third persons in respect thereto in the sum of $951 and was entitled to a retainer fee of $142.95 and the sum of $166.10 for services rendered in handling said advertising.

The affidavit of merits denied the allegations of the statement of claim, but admitted that defendant had agreed to pay the plaintiff for certain advertising, but denied that plaintiff properly performed said work, and stated that the plaintiff wholly failed to perform it, and thereupon defendant refused to pay for the work and offered the plaintiff $100 in settlement of all claims, which the plaintiff accepted, and that thereupon the claim of the plaintiff was discharged.

It is contended by the defendant that the finding and judgment of the court are contrary to the evidence; that it is

JAMES A. JOHNSON,
Appellee,

vs.

MIAMI AND CONNECTING COMPANY,
a Corporation,
Appellant.

APPEAL FROM MARION COUNTY
DR. MCCOY.

AFFIRMED.

Mr. Justice MCCOMBS DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for a plaintiff in the sum of $[illegible], entered upon the finding of the court.

The statement of claim alleged a verbal agreement between plaintiff and defendant, whereby the plaintiff was to construct an overflowing dam[illegible] at a cost, for the services of the plaintiff and for work and material, to be furnished by the defendant and [illegible] to be presented on the [illegible] and to exceed $[illegible]. It was alleged that plaintiff incurred an expense of $[illegible] and also furnished material [illegible] of which payment in respect thereto in the sum of $[illegible] and was entitled to a reasonable fee of $[illegible] and the sum of $[illegible] for services rendered in handling said [illegible].

The defendant denied [illegible] the all[illegible] of the statement of claim, but admitted that [illegible] agreed to pay the plaintiff for certain services, but [illegible] plaintiff performed [illegible] work, [illegible] for plaintiff's whole failure to perform it. [illegible] defendant refused to pay for the work and [illegible] the plaintiff [illegible] in satisfament of all claims, which was [illegible], and [illegible] the claim of the plaintiff was discharged.

It is contended [illegible] the [illegible] and judgment of the court was [illegible] the evidence [illegible]

established by a preponderance of the evidence that the defendant paid to the plaintiff the sum of $100 in full of all the claims of defendant, and further that the evidence shows a variance between the pleadings of the plaintiff and the proof submitted in support of the same.

As the question of the alleged variance was not raised upon the hearing, it will be unnecessary to discuss it; and the controlling question in the case therefore is, whether a preponderance of the evidence shows an accord and satisfaction.

The plaintiff testified that he was introduced to Mr. Goldstone of the defendant company by one of his own employees, a Mr. Schild, and that a conversation took place on June 19, 1922, to the effect that "We were to prepare a sample advertising for him and if the advertisement was satisfactory we were to build him an advertising campaign. We prepared an advertisement and he said go ahead and build the rest of the campaign."

The plaintiff further testified that he went ahead and wrote a number of ads., prepared the copy and all the mechanical work; that he did not get far because he was stopped by a letter from the defendant, in which defendant said he had received some invoices, but the amounts were not "in common with arrangements I had with you;" that he immediately went to Goldstone's office and Goldstone told him that the campaign was no good; that the expense was tremendous; that "everything was wrong and all he owed us was $190. This was in December, 1922."

Plaintiff further testified that prior to that time the work had been all completed; that the plaintiff has built twelve or thirteen advertisements, the copy, the cuts and the zincs and the art work, and all these bills had been charged to him; that he delivered the invoices for the same to the defendant, and plaintiff says, "At the last meeting we had I said to him that

established by a preponderance of the evidence that the defendant paid to the plaintiff the sum of $100 in full of all the claims of defendant, and further that the evidence shows a waiver on the plaintiff's of the plaintiff's [illegible] in support of the same.

As the question of the alleged waiver was not raised upon the pleadings, it will be unnecessary to discuss it; and the controlling question in this case therefore is, did the plaintiff's conduct in the case constitute a waiver of his contract.

The plaintiff testified that he was "[illegible]" by Mr. Gaiserano of the Union and "[illegible]" by one of his employees, a Mr. Arnold. He [illegible] on June 15, 1920, to the effect that [illegible] advertising for him and if the [illegible] were to build him an advertising [illegible]. He proceeded to [illegible] statement and he said he [illegible] a [illegible].

The plaintiff further testified that he [illegible] wrote a number of [illegible] requesting the [illegible] work; that he did not get far enough [illegible] from the defendant, another [illegible] involved, but the meaning was that "[illegible] and with you." [illegible] "[illegible] was transacting; that "[illegible] $100. This was in December, 1917."

The plaintiff further testified that [illegible] the work had been [illegible] twelve or fifteen [illegible], the [illegible] minute and the art work, but only [illegible] that he [illegible] that he delivered the [illegible] and plaintiff says, "At the last [illegible]

if he would pay the outstanding bills, I had no hope of collecting it. I lost all confidence I had in him, I said, 'if you will pay the bills outstanding against your account and give me $100, I will call it square.' He gave me $100. He paid one ninety dollar bill. The exact amount of bills outstanding are about $1,100."

On cross-examination plaintiff testified that when he first saw Mr. Goldstone, plaintiff said he was going to submit a sample of his work, and that in some agencies it was customary to get the O. K. of the client on everything that they did, if they didn't trust the client; that he never got Mr. Goldstone's signature or O. K. or the O. K. of Blauer and Goldstone Company on any print or any advertising matter that he submitted; that he did not have a signed contract; that he never had them write a letter to him about the agreement and never wrote them a letter about the agreement.

Plaintiff further testified that he had seen the check, which was produced, but it was not in the same condition as when he last saw it; that the bank's stamp was not on it then, and did not have the statement on it of settlement in full to date.

Mr. Schild testified, "We prepared these three ads., took them in to him. There was one we said we would build up for $150, and if he liked that one, we could go ahead with the campaign and finish the thing up. 'Well,' he said, 'Go ahead and fix up this ad.'" The witness further says that it was taken back at the time when one of the salesmen or he, presumably Mr. Goldstone, was going to a convention, and he said that it was fine and that he would take it along with him, and asked for the privilege of taking along the other layouts, and that they let him take those along; that when he came back he said that he would see them, and if he liked them he would go ahead with them; and that when he came back, he at least said, "Fine, go ahead," and they went ahead and prepared the rest of the things; that they never saw Mr. Goldstone

If he would pay the outstanding bills, I did so hope to satisfactorily it. I had all sufficiency I had in cash. I said, 'If you will pay the bills outstanding against your account, we give up this, I will call it square.' He gave me it... A pair one ninety dollar bill. The exact amount of bills outstanding are about 12,000.'

On cross-examination plaintiff testified that when Mr. Tiffany, Mr. Goldstone, initially went to see going to submit a sample of his work, and that in some agreeing it was customary to get the O. K. of the client on everything that they do, if they didn't trust the client, that he never got Mr. Goldstone's signature or O. K. on the C. O. D. Tiffany and Goldstone's company on any point or any advertising matter that he submitted; and he did not have a signed contract; that he never had some article a letter to him about the agreement and never wrote that a letter about the agreement.

Plaintiff further testified that he had seen the check, which was in court, and it was in the same condition as when he last saw it; that the Bowlin group was not in it then, and did not have the amount on it of assignment in full at that.

Mr. Morris testified, "We presented some checks.. took them in to him. There was one or two or three checks, 9150, and I'm sorry I don't know, we could, I think that the same point and finish the entire job. Still, I'm sorry, we could not fix up this and." The witness testified that it was taken back at the time when one of the [illegible], Mr. Goldstone was going to a convention, and [illegible] would have it signed with him. [illegible] along the other layouts, and [illegible] that when he came back [illegible] filled then he would [illegible] he as I say said, "Oh, [illegible]" [illegible] parts the rest of the things; that they never saw Mr. Goldstone

at any time afterwards during the preparation of the ads. This, he said, was some time in September; that after receiving the letter they went over and took all the drawings and engravings to Mr. Goldstone, but he claimed that he did not want any of it, and that there was an argument back and forth about the fact of his telling them to go ahead with it, but Mr. Goldstone said that he did not say that, they thought they would let it rest awhile.

Samuel Stolts, for the plaintiff, testified that he was an advertising artist, and that he had done a little over $400 worth of work in connection with the Johnson service for Blauer Goldstone Company, and had rendered statements for this work, and that some time in October he had a talk with Mr. Goldstone, in which he, Goldstone, said he liked the work which Mr. Johnson had been doing for him very much.

For the defendant, Mr. Goldstone, the treasurer of the defendant company, testified that it was a wholesale jewelry business and doing considerable advertising. He says that in the conversation with plaintiff he asked what the approximate cost would be in the event "we approved what he submitted to us." The plaintiff replied that it would be in the neighborhood of $150 for the proofs and the completed ads.; that later one or two ads. were submitted to him, and afterwards the plans of the ads. were submitted; that he told plaintiff and Mr. Schild that the ads. were unsatisfactory, and that the defendant could not use them, and he says that as a matter of fact they never did use them; that after receiving invoices from plaintiff in November, 1922, he wrote a letter, to which reference has already been made; that plaintiff thereupon came to his office and told him that he was hard up and needed money; that the witness told plaintiff that defendant did not owe him anything because the ads. submitted had never been approved with one possible exception; that plaintiff said that he was in

at any time afterwards during the prosecution of the work. [illegible], he said, was some time in November; that after December, the [illegible] they went over and took all the drawings and [illegible] to the defendants, but he claimed that he did not make any [illegible] there was an argument back and forth about the [illegible] in finishing them to go ahead with it, [illegible]. Valentine said, he did not say that, they thought they would let it rest [illegible].

[illegible] Samuel Stoley, for the plaintiff, testified that he was an advertising artist, and that he had done a little over $400 worth of work in connection with the Gibbons [illegible] for Diamond Gelatine company, and had received a [illegible] for work; and that were his [illegible] in this [illegible] stone, in which the Gelatine, and he [illegible] work which Mr. Johnson had been doing for him [illegible].

[illegible] For the defendants, Mr. Hubbard, the president of the defendant company, testified that he was [illegible] Gelatine having business and being [illegible] concerned. He [illegible] the conversation with [illegible] to what that [illegible] would be in the event he approved what he saw. [illegible] The plaintiff replied that [illegible] for the production of [illegible] were submitted to [illegible] submitted; that [illegible] were unsatisfactory, [illegible] he says that [illegible] receiving invoices from [illegible] letter, in which [illegible] thereupon came to his office [illegible] made money; that the witness said plaintiff had [illegible] one his supplies [illegible] with and possible economies [illegible]

destitute circumstances, and the witness then told him that rather than prolong the matter, which was a disputed one, he would give plaintiff a check for $100 "in full payment of all claims he had to date, which he agreed upon."

The witness further testified that he then called in the bookkeeper, Mr. Wray, in his presence, and told him to make a check to plaintiff's order for $100 in full payment of claims plaintiff had; that Wray drew up the check and brought it to the witness, who signed it, and that he had not heard anything further of the matter until suit was filed. He further testified that the proofs and the ads. are not in possession of the defendant, but were, to the best of his knowledge, returned.

The check was introduced in evidence, being No.5876, made by the defendant company, dated Chicago, December 18, 1922, to the order of plaintiff, for the sum of $100. It is signed by Joe Goldstone, treasurer, and drawn on Greenebaum Sons Bank & Trust Co. In the left-hand corner is written, "In settlement of account in full to date." On the back of the check at the top are the words, "Settlement in full to date." It is endorsed by the plaintiff and Irva Romaine Johnson, and stamped "Paid."

It appears that the body of the check is in the handwriting of Mr. Wray, and Goldstone testifies that the notation on the face of the check, "In settlement of account in full to date," was on the check before he signed it and before he delivered it to the plaintiff in the case; that the notation on the back of the check at the top, "Settlement in full to date," was on the check before he signed it and before he delivered it to plaintiff, and that both of these notations are in Wray's handwriting.

The witness, Goldstone, further testified that he never signed an order for work to be done by the plaintiff; that he never gave anybody else an order for work that is [illegible]

upon; that he never O. K.'d any proofs that were submitted to him by plaintiff or anybody else in connection with this work. The check was given December 18, 1922, and this suit was started in September, 1923.

Mr. Wray, the bookkeeper, testified that he remembered clearly the incident of plaintiff being in the office in the month of December, 1922; that Mr. Goldstone called the witness in his office and asked him to make a check for Mr. Johnson for $100; that he, the witness, went out and got the check ready for him and brought it back to them, and Mr. Goldstone said, "Now, Mr. Johnson, this check is in payment of all claims to date, in full settlement. Is that right?" Mr. Johnson said, "Yes, that's right;" that the witness then went back and put the notation on the back of the check to the effect that it was in settlement of all claims in full to date, and that when he brought it back for Goldstone's signature, Mr. Goldstone asked him whether he didn't think that he ought to put the notation on the front of the check, which he did. He says that this conversation took place in the presence of the plaintiff, Goldstone and himself. The witness says, positively, that the notations were on the face of the check and on the back of the check before Goldstone signed it.

The plaintiff, in rebuttal, testified: "I heard the testimony here of Mr. Wray stating that he came into Mr. Joseph Goldstone's office with this check and that Mr. Goldstone stated to him that this was in full of all demands to date and all claims to date. Mr. Goldstone made that statement to the bookkeeper. I didn't say anything. He told the bookkeeper to bring in a check for $100, and he did."

There was further testimony in rebuttal by one Stoltz, a creditor of plaintiff, who says that plaintiff brought the check over to him. He says the check is not in the same condition that

upon; that he never [illegible] A.M. was [illegible] that were [illegible] to him by plaintiff or anybody else [illegible] conversation [illegible]. The check was given November [illegible], 1923, and the suit was begun in September, 1923.

[illegible], the bookkeeper, testified that he remembered clearly the keeping of a statement being in the office in the month of December, 1923; that he, defendant called for statements in the office and asked him to make a check for [illegible]; that he, the witness, went out and got the [illegible] and gave it back to them, and [illegible] check is in [illegible] to the [illegible] that simply [illegible] witness [illegible] upon to the effect [illegible] to date, [illegible] ture, [illegible] ounce [illegible] plaintiff [illegible] that the negotiations were on the item of [illegible] of the check [illegible].

[illegible] testimony [illegible] defendant [illegible] to him [illegible] to [illegible] that's any [illegible] for [illegible].

[illegible] a motion of [illegible] over to him. [illegible]

it was when plaintiff offered it to him, and that the notations on the front and back of the check were not there at that time. The memory of this witness, however, when tested upon cross-examination, indicates that as to other matters about the check it was quite deficient.

In view of all the evidence which we have recited, and particularly in view of the admission made by the plaintiff in his testimony in rebuttal, as well as weighing the probabilities, we regard as established by an overwhelming preponderance of the evidence, that the claim was disputed and that the check for $100 was given in full satisfaction of it; and this being so, it follows that the finding and judgment of the court must be reversed. Canton Coal Co. v. Parlin etc. Co., 215 Ill., 244; Snow v. Griesheimer, 220 Ill., 106; Bingham v. Browning, 197 Ill., 122; Lapp v. Smith, 183 Ill., 179; Ostrander v. Scott, 161 Ill., 339.

The judgment of the trial court is therefore reversed, with findings of fact and judgment for defendant here.

REVERSED WITH FINDINGS OF FACT
AND JUDGMENT HERE.

Johnston and McSurely, JJ., concur.

It was when plaintiff attacked it to him, and that the notations on the front and back of the check were not there at that time. The company of this witness, however, when tested upon cross-examination, indicates that as to other matters about the check it was quite definite.

In view of all the evidence which we have mentioned, and particularly in view of the admission made by the plaintiff in his testimony in rebuttal, we feel as regarding the preliminary ruling, we regard as established by the preponderance of the evidence, that the claim was signed in the place for sign was given in full, initial notation of it; and this notation, it appears that the rule and in case of the check must be observed.

Dunlop Coal Co. v. Berwin-White Coal Mining Co., 187 Ill. App. 1; Cooper v. Drakeley, 99 Ill. App. 306; Stearns v. Stearns, 107 Ill. App. 1; Lewis v. Ewing, 108 Ill. App. 372; Lehmkuhler v. Lewis, 124 Ill. App. 232.

The judgment of the circuit court is therefore reversed with finding of fact and judgment for defendants here.

Reversed and judgment.

Scott, J., and Gridley, J., concur.

500 - 30764 FINDINGS OF FACT.

We find as facts that the claim for which plaintiff in this case, appellee, sues was in dispute between the parties, and that while so disputed the defendant gave to plaintiff a check for the sum of $100, which plaintiff accepted in full settlement of his claim; that the parties therefore entered into an accord and satisfaction, which is a bar to plaintiff's claim.

We find as Tacke from the winds for which probability in this case, impossible, even can in strength between the systems, and that while we thought we refuse were to plausible a check for the sum of size, which probability increased in full fifty-fold of his alone; that the particles therefore relevant into an average and modification, which is a bar to plausibility alone.

10 - 29546

5071

SAMUEL STROBL,
Plaintiff in Error,

vs.

J. J. INGELS,
Defendant in Error.

ERROR TO COUNTY COURT OF COOK COUNTY.

240 I.A. 674

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is a writ of error prosecuted by the plaintiff, Samuel Strobl, from an order of the County court of Cook county, vacating a judgment by default in favor of the plaintiff after the term, on motion of the defendant in a proceeding under Section 89 of the Practice Act, which allows errors of fact to be corrected after the term at which a judgment was entered by motion in the nature of a writ of error coram nobis.

The defendant has made a motion to dismiss the writ of error on the ground that the order vacating the judgment in favor of the plaintiff is an interlocutory order and not a final appealable order. We are of the opinion that the order was a final appealable order and that the motion to dismiss the writ of error should be denied. Harris v. Chicago House Wrecking Company, 314 Ill., 500, 505, 508, 509; Cramer v. Commercial Men's Association, 260 Ill., 516, 519, 520; DiMeo v. Hines et al., 229 Ill. App. 486, 489, 490; Bishop v. Illinois Western Electric Company, 221 Ill. App., 141, 143; Central Bond & Mortgage Company v. Reeser, No. 29456, opinion filed in this court, not reported.

In support of his contention that the order in question is not a final appealable order, counsel for the defendant cites the following cases: Walker v. Oliver, 63 Ill., 199, and Park Ridge v. Murphy, 258 Ill., 365.

Those cases relate to judgments other than judgments under section 89 of the Practice act. It was so held in the case of Cramer v. Commercial Men's Association, supra. (p. 519.)

The question to be determined on the writ of error is whether the County court erred in entering the order vacating the judgment by default after the expiration of the term at which the judgment was entered. The decision of this question depends upon the question of the sufficiency of the motion of the defendant under section 89. The motion of the defendant was demurred to by the plaintiff on the ground that the motion did not allege any error of fact which would justify the trial court in vacating the judgment. The motion of the defendant was as follows:

"And now comes J. J. Ingels, defendant in the above entitled cause, by George C. Geier, his attorney, and moves the court to vacate and set aside the judgment heretofore entered on the 27th day of August, A. D. 1924, to stay an execution as issued upon the said judgment and to vacate and set aside the default as entered on the 27th day of August, A. D. 1924, and for grounds of said motion this defendant shows the following:

1. That the judgment is void and erroneous in fact.
2. That the plaintiff has no cause of action against this defendant.
3. That the declaration as filed in said cause contains the common counts and a special count.
4. That the special count is for breach of warranty.
5. That the common counts cannot be joined with a special count when the action is upon a breach of contract.
6. That the common count as pleaded should be stricken from the declaration.
7. That the judgment was entered for Six Hundred Fifty Dollars ($650.00) and the special count alleges damages in the sum of Five Hundred Fifty Dollars ($550.00).
8. That the plaintiff is insolvent and is indebted to the defendant in a sum far in excess of that claimed by the plaintiff.
9. That the said judgment is a fraud against the defendant and would not have been entered by the Court if the

There [illegible]

months after [illegible]

the case of Cooper v. [illegible]

(pp. [illegible])

[illegible]

is whether the [illegible]

the judgment by default [illegible]

the judgment was [illegible]

upon the [illegible]

and party section 33. [illegible]

by the plaintiff [illegible]

error, [illegible]

judgment. The motion [illegible]

That [illegible]

entitled cause, [illegible]

court of [illegible]

the 17th day of [illegible]

lement upon [illegible]

defendant [illegible]

for [illegible]

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

7. That the judgment [illegible]

8. [illegible]

9. [illegible]

Court was apprised of the facts of said litigation.
10. That the Court was imposed upon in entering said judgment.
11. That the rules of Court have not been complied with.
12. That no notice was served upon the defendant or his attorney prior to the entry of the default.
13. That the judgment in other respects is void and erroneous.
14. That the judgment is erroneous because the suit is based upon a warranty which must be declared specially in the declaration and to warrant the recovery plaintiff should have offered evidence to prove the special damages."

The errors of fact contemplated by section 89 must not be errors appearing on the face of the record or errors contradicting the finding of the court. The errors of fact must be facts unknown to the court when the judgment was entered, and must be facts of such character that if known to the court would have precluded, as a matter of law, the entry of judgment. Examples of errors of fact which would support a motion in the nature of a writ of error coram nobis, are such as the death of a nominal defendant, infancy without a guardian, disability of coverture, and insanity at the time of the trial. Chapman v. North American Insurance Company, 292 Ill. 179, 185; Marabia v. Thompson Hospital, 309 Ill., 147, 152; Satin v. Twin City Fire Insurance Company of Minneapolis, Minnesota, No. 30060, opinion filed in this court November 31, 1925, not yet reported.

In the case of Chapman v. North American Insurance Company, supra, the court said (pp. 185, 186): "It is important in considering this question to keep in mind this proposition: that the trial court cannot review itself or its own judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the term of court has ended. At any time before the term has ended the court may review its judgment as to matters of fact or matters of law decided by it and correct its judgment, if erroneous."

Court was operated of the issue of said illegality.

10. That the Court was imposed such in violating with jurisdiction.

11. That the rules of Court have not been complied with.

12. That no notice was served upon the defendant or his attorney prior to the entry of the judgment.

13. That the judge was in other proceeding in which proceeding.

14. That the judgment is erroneous because the suit is based upon a warranty which must be a clear and unmistakably in the declaration and to warrant the necessary claim that should have strictness to cause the special issues.

The errors of fact complained by section 6 must be errors apparent on the face of the record or errors contradicting the finding of the court. The errors of fact must be facts unknown to the court when the judgment was entered, and must be facts of such character that if known to the court would have prevented, or ought to prevent, the entry of judgment. Examples of errors of fact which would support a motion in the nature of a writ of error coram nobis, are such as the death of a material litigant, infancy without a guardian, illegitimacy of coverture, and insanity at the time of the trial. Chamberlain v. North American Insurance Co., 90 Ill. App. 1899; Kroeger v. Thompson Township, 90 Ill. App. 1899; Abel v. Cohen v. Cook County Hospital, 90 Ill. App. 1900; Cohen v. Cook County Hospital, 90 Ill. App. 1900, where the trial court denied a motion to vacate a judgment and quashed the case, rather than to [illegible] that found on pleading by the court or in any [illegible] of law decided by it after the term of court was over. [illegible] before the term was ended [illegible] to [illegible] as to matters of fact on matters or [illegible] by [illegible] the jurisdiction. [illegible]

In the case of Marabia v. Thompson Hospital, supra, the court said (p. 152): "The writ of error coram nobis will not lie for error or mistake of the judges in point of law, but a writ of error must be sued out of the superior court to correct such error."

Testing the motion of the defendant by the principles announced in the cases above cited, we are of the opinion that the motion does not allege any errors of fact in the sense of section 89. The order of the trial court vacating the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

In the case of *Kennedy* v. *Thompson Grocery Co.*, supra, the court said (p. 188): "The writ of error *coram nobis* will not lie for error or mistake of the judges in point of law, but a writ of error will be used out of the superior court to correct such error."

Testing the motion of the defendant by the principles announced in the cases above cited, we are of the opinion that the motion does not allege any errors of fact in the sense of section [illegible]. The order of the trial court vacating the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Hatcher, P. J., and Moorer, J., concur.

29988

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PEOPLE OF THE STATE OF ILLINOIS
ex rel. AURELIA HARRIS, arrested
at the suit of L. M. SMITH,
Appellee,

vs.

PETER HOFFMAN, Sheriff of Cook County,
and DENNIS J. EGAN, Bailiff of the
Municipal Court of Chicago,
Appellants.

APPEAL FROM COUNTY
COURT OF COOK COUNTY.

240 I.A. 675

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants, Peter M. Hoffman, Sheriff of Cook County, and Dennis J. Egan, Bailiff of the Municipal court of Chicago, from an order of the County court of Cook county, discharging the petitioner, Aurelia Harris, from the custody of the sheriff.

The petitioner was imprisoned at the suit of L. M. Smite for the alleged malicious conversion by the petitioner of property in a chattel mortgage, executed by the petitioner and her husband to secure a note for money borrowed from Smite. The petitioner filed a petition in the County court for release under the Insolvent Debtors Act. Prior to the proceeding in the County court Smite had begun an action of replevin in the Municipal court to recover the property. By leave of court Smite filed a count in trover in the replevin proceeding. Judgment was obtained against the petitioner in the replevin proceeding.

On the hearing in the County court on the petition under the Insolvent Debtors Act, the court permitted evidence to be introduced before a jury on the question whether malice was the gist of the action in the Municipal court. The jury found that malice was not the gist of the action.

In re Petition of Pauline Sawick, 207 Ill. App. 100,

PRINCE [illegible] OF [illegible],
on rel. AMELIA RANDLE, appearing
at the suit of [illegible] M. [illegible],
Appellee,

vs.

PRINCE NORMAN, Sheriff of Cook County,
and [illegible] E. [illegible], Judge of the
Municipal Court of Chicago,
Respondents.

MR. JUSTICE, JOHNSTON [illegible] OPINION [illegible].

This is an [illegible] Sheriff of Cook County, [illegible], Sheriff of Cook County, and [illegible], Judge of the Municipal Court of Chicago, from an order of the [illegible] court of [illegible] county, [illegible], the petition [illegible] Amelia Randle, from the custody of the sheriff.

The petitioner was imprisoned on the [illegible] suits for the alleged malicious destruction by [illegible] property [illegible] chattel mortgage, replevied by [illegible] husband to secure a note [illegible]. The [illegible] tioner filed a petition [illegible] Municipal Court [illegible]. [illegible] suits had been [illegible] over its property. By [illegible] over in the replevin proceedings. [illegible] petitioner [illegible].

[illegible]

under [illegible] Revised Statutes [illegible] introduced before a jury in the [illegible] of the action in a habeas [illegible] was not the acts of the [illegible].

In re [illegible] of [illegible] a wife, [illegible].

105, 106, it was held that in an action of trover in the Municipal court, where there is an inconsistency between the statement of trover with the affidavit attached, and the verdict of the jury, the County court was entitled to admit evidence offered by the petitioner to determine whether the petitioner maliciously appropriated the property.

Counsel for the defendants concede that malice is not necessarily the gist of an action in trover; and that in the case at bar the question whether malice was the gist of the action in the Municipal court is to be determined from an examination of the record.

We are of the opinion that the abstract of the proceeding in the Municipal court is not sufficiently full to enable us to determine the question whether malice was the gist of the action in the Municipal court. In this state of the record the order of the County court should be affirmed. Glos v. Shedd, 218 Ill., 209, 217, 218; Love v. Dick, 177 Ill. App., 98, 99, 100; Lanigan v. J. C. Henderson & Co., 188 Ill. App., 568, 569; Thornton v. Muus, 120 Ill. App., 422, 424.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

108, 109, it was held that [illegible] of [illegible] court, where [illegible] transfer with the affidavit of merit, and file [illegible] the County court was [illegible] petitioner [illegible] prejudiced the [illegible].

Cases for the jurisdictional grounds that [illegible] necessarily the list of [illegible] at bar the [illegible] the Municipal [illegible] record.

To [illegible] ing in the [illegible] determine the [illegible] the Municipal court. [illegible] County court [illegible] 217, 218; [illegible] v. [illegible], 107 [illegible], [illegible], 99, 100; [illegible] [illegible], 100 [illegible], [illegible]; [illegible] v. [illegible], [illegible] App., 428, 431.

[illegible]

Latchaft, T. L., and [illegible], J., [illegible].

155 - 30001

WILLIAM BURGESS,
Appellee,

vs.

JOHN MYERS and JOHN MORIARITY,
Doing Business as the Kenwood
Trucking & Teaming Company,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 675

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago brought by William Burgess, the plaintiff, against John Myers and John Moriarity, doing business as the Kenwood Trucking & Teaming Company, the defendants, to recover a balance alleged to be due to the plaintiff from the defendants for hauling dirt for the defendants. The amount in dispute is $971.84.

The case was tried before the court without a jury. The court entered judgment in favor of the plaintiff in the sum of $736.20. From the judgment the defendants have prosecuted this appeal.

The grounds on which the defendants rely for reversal relate to the evidence.

The precise issue, which is one of fact, is whether the plaintiff charged on the basis of 2½ yard loads or 2 yard loads.

Counsel for the defendants contend that the judgment is manifestly against the weight of the evidence.

Counsel for the plaintiff maintain that the evidence is so inadequately abstracted by the defendants that the court cannot determine intelligently the question of the weight of the evidence; that according to the well established rule, a reviewing court will not examine the record to find grounds for reversing a judgment, but will presume that the court heard sufficient evidence to sustain the

188 - 5001

[illegible]

BURLIN & MORRIS,
Appellees,

vs.

JOHN BYRNE and JOHN SCHLAFLY,
Doing Business as the Jackson
Trucking & Towing Company,
Appellants.

[illegible]

MR. JUSTICE DONAHUE delivered the opinion of the Court:

This is an action in the nature of trover brought by Burlin & Morris, [illegible] John Schlafly, doing business as the Jackson Trucking & Towing Company, the defendants, to recover a [illegible] to the plaintiff from the [illegible] or towing [illegible] Fondante. The amount in dispute is [illegible].

The [illegible] The court entered judgment [illegible] of $750.00. From this judgment [illegible] appeal.

[illegible] relate to the evidence.

[illegible] the plaintiff sued on the [illegible] manifestly [illegible] the [illegible] is [illegible] as inadequately [illegible] [illegible] that [illegible] not [illegible] will [illegible]

judgment.

We are of the opinion that the testimony is not sufficiently abstracted to enable us to pass intelligently on the question whether the judgment is manifestly against the weight of the evidence. Six witnesses testified in the case. The transcript of their testimony, which comprises 218 typewritten pages, has been abstracted in the printed abstract in 15 pages.

Counsel for the defendants state that "The omissions of testimony referred to by counsel of appellee in general dealt with jobs not in dispute," and that "the other testimony ** was repetition and cumulative evidence, the gist of which was covered in testimony which was abstracted or which was not material to the issue as to whether or not appellee made out a prima facie case, and the other issues raised in appellants' brief."

We do not think that the explanation of counsel for the defendants is sufficient. Since we are asked to reverse the judgment on the ground that it is manifestly against the weight of the evidence, the testimony should be abstracted fully in order that we may determine whether the testimony relates to other "jobs not in dispute" and whether it was "cumulative" and "not material." We should not accept, without verification, the interpretation which counsel for the defendants place on the omitted testimony.

The rule is well settled that the appellant is required to furnish a complete abstract showing everything necessary to a determination of the questions involved on appeal. Kieshkowski v. Bostrom, 179 Ill. App. 73, 75; and that where the testimony is inadequately abstracted the presumption should be indulged that the evidence, if completely abstracted, would sustain the judgment. Glos v. Shedd, 218 Ill. 209, 218; Love v. Dick et al., 177 Ill. App. 98, 100.

judgment.

It was of the opinion that the testimony is not sufficiently substantial to enable us to pass intelligently on the question whether the jury's verdict is manifestly against the weight of evidence. Six witnesses testified in the case. The transcript of their testimony, which comprises 518 typewritten pages, has been abstracted in the printed record in 15 pages.

Counsel for the defendant [illegible] that "the quality of testimony returned is by nature of a nonsense in material fact with jobs not in dispute." and that "the whole testimony is was repetitious and unimaginative [illegible], the [illegible] which was [illegible] in testimony which was [illegible] or which was not material to the issue as to whether or not [illegible] is not a [illegible] case, and the other issues raised [illegible] material."

We do not think that the [illegible] of [illegible] the defendants is a [illegible]. Given an [illegible] to review the judgment on the ground that it is manifestly against the weight of the evidence, the testimony must be abstracted fully in order that we may determine whether the testimony relates to a fact "jobs not in dispute" and [illegible] "unimaginative" and "not material." We should not assert, without verification, the interpretation which counsel [illegible] the [illegible] or of testimony.

The rule is well settled that [illegible] in reversing to furnish a [illegible] characterization of the evidence [illegible]. [illegible] v. [illegible], 170 Ill. App. 73, [illegible] adequately abstracted the proceedings [illegible] evidence, is [illegible] [illegible] Dixon v. [illegible], 170 Ill. App. 99, 1.c.

It is also the rule that the court will not examine the record for the purpose of ascertaining whether a judgment should be reversed. Thornton v. Muus, 120 Ill. App. 422, 424; Salisbury v. Deutsch, 178 Ill. App. 633, 634.

Counsel for the defendants contend that the judgment of the court is based on hearsay evidence.

The abstract shows that on direct examination of the plaintiff certain testimony of the plaintiff, which appeared to be testimony given on his own knowledge, was shown on cross examination to be hearsay testimony. No objection was made to the testimony and no motion was made to strike it from the record. In this state of the record the court was bound to treat the hearsay evidence as competent evidence. Hoover v. Empire Coal Company, 149 Ill. App. 258, 263; Mason v. Truitt, 257 Ill., 18, 22; Slingluff v. Builders Supply Company, 89 Md. 557, 562; Lamb v. Taylor, 67 Md., 85, 93, 94; 2 Jones Commentaries on Evidence (Blue Book ed.), section 297, p. 634.

Furthermore it will be presumed in view of the inadequacy of the abstract that there was competent evidence independently of the hearsay evidence to support the judgment. On the trial by the court without a jury it will not be presumed that the court considered improper evidence in reaching a decision. The Merchants Despatch Transportation Company v. Joesting, 89 Ill., 152, 154.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

It is also the rule that the court will not examine the record for the purpose of ascertaining whether a judgment should be reversed. [illegible] v. [illegible], [illegible] Ill. App. [illegible], [illegible]; Salisbury v. [illegible], [illegible] Ill. App. [illegible], 6[illegible]4.

Counsel for the defendants contend that the [illegible] of the court is based on hearsay evidence.

The abstract shows that [illegible] the plaintiff [illegible] testimony given on [illegible] was [illegible] to be hearsay testimony. No objection was made to [illegible] and no motion was made to strike it from the record. In this state of the record the court was bound to treat the hearsay evidence as competent evidence. Hoover v. [illegible] Company, [illegible] Ill. App. [illegible], 2[illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; [illegible] v. [illegible] Supply Company, 90 [illegible], [illegible]; [illegible] v. [illegible], [illegible] Ill. [illegible]; 2 Jones Commentaries on Evidence [illegible], p. 654.

[illegible] quacy of the abstract that [illegible] of the hearsay evidence [illegible] the court without a jury it will not be presumed [illegible] considered [illegible] evidence in [illegible]. [illegible] Transportation Company v. [illegible], [illegible] Ill. [illegible].

For the reasons stated the judgment [illegible] is affirmed.

Affirmed.

Matchett, P. J., and O'Connor, J., concur.

180 - 30032

56-2

JAMES M. KENNEDY and O. VON RAUTENKRANZ, Trading as LAKE VIEW REAL ESTATE EXCHANGE,
Appellees,

vs.

CHARLES F. HENRY,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

240 I.A. 675

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Superior court of Cook County brought by James M. Kennedy and O. Van Rautenkranz, trading as the Lake View Real Estate Exchange, the plaintiffs, against Charles F. Henry, the defendant, to recover real estate commissions alleged to be due to the plaintiffs from the defendant.

The case was tried before the court without a jury; and the court entered judgment in favor of the plaintiffs in the sum of $4950. From the judgment the defendant has prosecuted this appeal.

Briefly stated the undisputed facts are that the defendant employed the plaintiffs to negotiate an exchange of certain properties between him and John F. James; that the defendant agreed in writing to pay the plaintiffs as commissions for such service $4950, provided that no commissions were to be paid "until deal is closed and deeds delivered unless failure to close such deal is the fault of said Charles F. Henry," the defendant; that through the efforts of the plaintiffs a written contract for the exchange of the properties was signed by the defendant and James and the wife of James; that about a week after the contract was signed the defendant refused to carry out the contract.

The defendant assigns error on the rulings of the court in regard to the pleadings. The defendant filed the plea of the

general issue and eleven special pleas. The plaintiffs filed replications to the eleven special pleas. The objections of the defendant relate to the special pleas referred to as the second, eighth and twelfth. To the replications to these pleas the defendant filed general and special demurrers. The court overruled the demurrers of the defendant.

The substance of the second plea is that the plaintiffs, as agents for the defendant, concealed certain material facts from the defendant in regard to the property of the Jameses, which facts it was the duty of the plaintiffs to disclose to the defendant. The substance of the replication to the second plea is that the plaintiffs did not conceal such knowledge from the defendant; that the defendant was familiar with the property of the Jameses and did not rely upon any knowledge, judgment or information of the plaintiffs, but signed the contract for the exchange of the properties in the exercise of his own judgment and knowledge.

The ground of the special demurrer of the defendant to the replication to the second plea is that the allegations in the replication are immaterial and irrelevant.

In connection with the objection relating to the second plea, the defendant states that the court granted a proposition of law requested by the defendant, which is contrary to the action of the court in overruling the defendant's demurrer to the second plea. The proposition of law is as follows: "That if in the negotiations for and closing of the alleged real estate exchange contract involved in this case, the plaintiffs concealed from the defendant any information to his advantage or material to his decision in entering into such a contract, the plaintiffs are not entitled to recover in this case, even though such concealment did not result in injury to the defendant."

We fail to perceive that the defendant has any ground

general issue and eleven special pleas. The eleven pleas filed
repliications to the eleven special pleas. The objections of the
defendant relate to the special pleas filed in the second,
eighth and twelfth. In the replications to these pleas the
defendant filed general and special demurrers. The court overruled
the demurrers of the defendant.

The substance of the second plea is that the plaintiff,
title, by reason of the defendant, obtained certain material
facts from the defendant in the [illegible] of the insurance,
which facts it was the duty of the defendant to disclose to the
defendant. The substance of the replication to the second plea is
that the plaintiff did not possess such knowledge from the defendant; that the defendant [illegible] all [illegible] of the
insurance and did not rely upon any [illegible] of information of the plaintiff, but relied on the contract [illegible] the
the proportion in the [illegible] of [illegible].

The demurrer to the second demurrer [illegible] is
the replication to the second plea is [illegible] in the
replication [illegible].

In connection with the eighth [illegible] in the second
plea, the defendant [illegible] the court sustained a demurrer of
law interposed by the [illegible], [illegible] the court to [illegible]
the court to overrule [illegible]. The [illegible]
The proposition of law in [illegible]: "[illegible] the plaintiff
for any [illegible] of the [illegible] [illegible]
waived in this case, the [illegible] [illegible]
any information to the [illegible] or [illegible] to [illegible]
avoiding late such [illegible], [illegible] or [illegible]
however in this case, even [illegible] [illegible]
in [illegible] [illegible]."

We [illegible] [illegible]

for objection to the action of the court either in regard to the overruling of the demurrers to the second plea, or to the granting of the proposition of law requested by the defendant. We think that the court correctly overruled the demurrers; and as evidence was admitted under the second plea, the proposition of law in question indicates that the court considered the evidence according to the rule of law requested by the defendant in the proposition of law.

The substance of the eighth plea is that the plaintiffs "falsely represented" that the Jameses were owners of the property, whereas the Jameses were not the owners of the property.

The replication to the eight plea denies that the plaintiff falsely represented that the Jameses were the owners of the property.

The ground of the demurrer of the defendant to the replication to the eighth plea is that the replication admits that the Jameses were not the owners of the property.

We are of the opinion that in view of the facts that the defendant and the Jameses signed a written contract for the exchange of properties, and that the evidence does not show any fraud or misrepresentations by the plaintiff, it is immaterial, insofar as the plaintiffs are concerned, whether the Jameses were owners of the property or not. Fox v. Ryan, 240 Ill., 391; Rushkiewicz v. St. George, 226 Ill. App. 310, 314; Kaster v. Newbury, 170 Ill. App. 494, 496; Russell v. Hurd, 113 Ill. App. 63, 65; Springer v. Orr, 82 Ill. App., 558, 563.

In the case of Fox v. Ryan, supra, the court said (p. 397): "The vendor of property is not required to accept a purchaser without opportunity for investigation as to his ability to comply with the terms of the contract, but where he does accept

for obtention to the detriment of the owner either in regard to the
exercising of the decreases in the assumed plan, or in the [illegible]
ing of the assumed lot of law [illegible] by the [illegible]. [illegible]
that the court correctly overruled the demurrer, and a decree
was substituted using the proper plan, the [illegible] of the
question indicates that the court considered the [illegible] [illegible]-
ing to the rule of law supported by the [illegible] and the [illegible]-
tion of law.

The appellees in the [illegible] [illegible]
title "falsely represented" [illegible] were owned by the
property, across the Jensen [illegible] of the [illegible] of [illegible],
[illegible]
plaintiff falsely represented [illegible] the Jensen [illegible] the [illegible] of
the property.

The ground of [illegible]
rescission is the [illegible] [illegible] which [illegible]
the Jensen were [illegible] in the [illegible].

It was on the relation first on [illegible]
the defendant [illegible] the Jensen [illegible] a [illegible]
exchange of property, [illegible] [illegible]
fraud or misrepresentations by [illegible] [illegible]
inadver [illegible] [illegible], [illegible]
[illegible] [illegible]. [illegible] v. [illegible], [illegible] [illegible]:
[illegible] v. [illegible] [illegible] v.
[illegible], [illegible] [illegible] v. [illegible] [illegible]
[illegible]. [illegible]; [illegible] v. [illegible], [illegible], [illegible].

In the case of [illegible] v. [illegible], [illegible] [illegible]
(p. [illegible]): "The [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
to comply with the [illegible] of the contract, but [illegible] [illegible]

such purchaser, uninfluenced by fraud or misrepresentation, it is a determination by him of the purchaser's ability to perform his contract, and if the purchaser afterwards fails to perform it, the seller cannot defeat the broker's commissions on the ground that the purchaser was not able to buy the property. A large collection of cases are cited as so holding, in an exhaustive note to Lunney v. Healey, 44 L. R. A., 616."

It has been expressly held that the same rule in regard to the selling of land applies as well where land is exchanged. Field v. Ingersoll, 223 Ill. App., 457, 465. We are of the opinion that the court correctly overruled the demurrers to the eighth plea.

The twelfth plea alleges in substance that the plaintiffs represented both parties, and that prior to the signing of the contract for exchange of properties, the defendant had no knowledge of and did not consent to the double agency of the plaintiffs.

The replication to the twelfth plea denies that the plaintiffs represented both parties without the knowledge or consent of the defendant; and alleges that the defendant knew that the plaintiffs were representing both parties.

The ground of the defendant's demurrer to the replication to the twelfth plea is that the replication does not allege that the defendant consented to the double agency.

We are of the opinion that the replication was sufficient.

Furthermore, we are of the opinion that the evidence clearly shows that the defendant did have knowledge that the plaintiffs were acting as the agents of the Jameses; and that the defendant impliedly consented that the plaintiffs should act as agents of the Jameses. Our conclusions are based largely on the testimony

such purchaser, unimpaired by fraud or misrepresentation, is in a determination by him of the purchaser's ability to perform his contract, and if the purchaser afterwards fails to perform it, the seller cannot defend the broker's commissions on the ground that the purchaser was not able to buy the property. A large collection of cases are cited in support thereof, in an exhaustive note to Lynch v. Hurley, 44 L. R. A., 814.

It has been authoritatively held that the contract in regard to the selling of land written on real estate land is one governed. Pfirrmann v. Lunstedt, 98 Ill. App., 477, 481. We are of the opinion that the court correctly excluded the testimony to the eighth plea.

The twelfth plea alleges in substance that the plaintiffs representations both parties, and that owner in the signing of the contract for exchange of properties, the defendant had no knowledge of and did not consent to the double agency of the plaintiffs.

The replication to the twelfth plea that the plaintiffs represented both parties with the knowledge or consent of the defendant; and denies that the defendant knew that the plaintiffs were representing both parties.

The ground of the demurrer to the replication to the twelfth plea is that the replication on its face discloses that the defendant acquiesced [illegible] agency.

In one of the minutes that the [illegible] plaintiffs were [illegible] clear.

But above, in one of the minutes [illegible] clearly shows that the defendant did know [illegible] that the plaintiffs were acting in the capacity of the agents [illegible] defendant implicitly contended that the plaintiffs [illegible] of the business. Our conclusions are based largely on the testimony

of the defendant himself.

The evidence shows that the first connection that the plaintiffs had with the defendant in regard to the transaction in question was when their salesman, Seymour Lind, representing James, called to see the defendant in reference to an exchange of properties between the defendant and James.

The defendant was permitted to testify that before he signed the contract for the exchange of the properties he had no knowledge that the plaintiffs were acting as agents for the Jameses, and that he did not consent to such agency.

The defendant further testified that Lind stated that he had a farm and a lot which he wanted to trade for a building owned by the defendant; that the defendant told Lind that he would not be interested in the farm, but that he had a building which he might trade for the lot alone. The lot referred to is the property which is contained in the contract for the exchange of properties, subsequently entered into by the defendant and the Jameses.

After testifying to the terms of the exchange that were discussed by him and Lind, the defendant further testified that Lind said, "I will go and see James;" that subsequently Lind told him, the defendant, over the telephone, "We got James to sign the contract." The defendant also testified that Kennedy, one of the plaintiffs, and Lind told him that "James was the owner" of the property.

It will be observed that according to his own testimony the defendant knew that Lind came to him as the agent of James; that Lind took the defendant's counter proposition back to James and got James to sign the contract for the exchange of properties between the Jameses and the defendant; and that the defendant was told by Kennedy and Lind that James was the owner

of the defendant himself.

The evidence shows that the first conversation in which the plaintiffs had with the defendant or his agent in the transaction in question was when their solicitor, Seymour Hill, respondent James, called to see the defendant in reference to an exchange of properties between the defendant and James.

The defendant was permitted to testify that before he signed the contract for the exchange of the properties he had no knowledge that the plaintiffs were acting as agents for the Jaynes, and that he did not consent to such agency.

The defendant further testified over objection that he had a farm and a lot which he wanted to trade for a building owned by the defendant; that the defendant said that he would not be interested in the farm, but that he had a building which he might trade for the lot alone. He lot referred to is the property which is mentioned in the contract for the exchange of properties, subsequently executed by the defendant and the Jaynes.

After testifying to the terms of the exchange that were discussed by him with Hill, the defendant further testified that Hill said, "I'll go and see James;" that subsequently Hill told him, the defendant, that the exchange, "is not going to go on the contract." The defendant also testified that Hill, the agent of the plaintiffs, had said that in the "dealing was the owner" of the property.

It will be observed that therefrom, in the light most favorable to the defendant, the jury could have found that James, that Hill took the defendant's contract proposition back to James and got James to sign the contract for the exchange of properties between the Jaynes and the defendant; and that the defendant was told by Kennedy and Hill that James was the owner

of the property.

With this knowledge of the double agency of the plaintiffs, the defendant signed a written contract with the plaintiffs which recited that the defendant agreed to pay the plaintiffs $49 50 as commission for the exchange of properties between the defendant "and J. F. James and wife according to contract entered into on this date."

A further contention of counsel for the defendant is that the judgment should be reversed because the finding of the court was against the weight of the evidence.

The principal defense of the defendant, which has already been indicated, is that he was induced to sign the contract for the exchange of the properties with the Jameses by false representations of the plaintiffs.

The defendant, who was the only witness in his behalf, testified that he wanted to use the property which he would get from James for a large apartment building; that Lind and Kennedy falsely represented to him that the property was suitable for an apartment building and was zoned for apartment buildings; that they also made false representations as to the location of the property and as to the value of the property, and as to the ownership of the property.

According to the testimony on behalf of the plaintiffs, which was given by Lind and Kennedy, no such false representations were made to the defendant. Lind testified that "there really was not much to argue about;" that he told the defendant "James had met his terms;" that the defendant said to him, Lind, "By the way, do you know, is there a restriction on this vacant, is that for residential property only, or can they put up an apartment buildings?" that he replied, "That can

of the property.

With this knowledge of the double agency of the plaintiffs, the defendant signed a written contract with the plaintiffs which recited that the defendant agreed to pay the plaintiffs $600 as commission for the exchange of properties between the defendant "and L. F. Jones and wife according to contract entered into on this date."

A further contention of counsel for the defendant is that the judgment should be reversed because the findings of the court was against the weight of the evidence.

The principal defense of the defendant, which has already been indicated, is that he was induced to sign the contract for the exchange of the properties with the lessees by false representations of the plaintiffs.

The defendant, who was the only witness in his behalf, testified that he wanted to use the property which he would get from Jones for a large apartment building; that Jones and Kennedy falsely represented to him that the property was suitable for an apartment building and was zoned for apartment buildings; that they also made false representations as to the location of the property and as to the value of the property, and as to the ownership of the property.

According to the testimony on behalf of the plaintiffs, which was given by Jones and Kennedy, no such false representations were made to the defendant. Jones testified that "there really was not much to argue about;" that he told the defendant "Jones had met his price;" that the defendant said to him, Jones, "By the way, do you know, is there a restriction on this vacant, is that for residential property only, or can they put up an apartment building?" that he replied, "that can

easily be looked up."

We are of the opinion that the finding of the court is not manifestly against the weight of the evidence.

Counsel for the defendant further contends that the court committed reversible error in excluding certain evidence offered by the defendant.

The substance of the evidence offered was (1) that the defendant made a specialty of building apartment buildings, wanted a lot suitable for that purpose, and that the property in question was not suitable; (2) that the property was in a business neighborhood, and the street was unpaved; (3) that the property was zoned for business and not for apartment buildings; (4) that the reason that the property was not suitable for apartment buildings was that "the cost of building and the rents obtainable" made it prohibitive to build apartment buildings in that locality; (5) that it would appear from certified copies of mechanics' liens filed against the property that certain persons attempted to build a thirty-six apartment building on the property but failed, "because the location was so poor that they could not get loans, though the loan market was easy for apartment buildings on suitable locations at that time."

Counsel for the defendant does not contend that he was unable to make proof of any of his defenses, because of the exclusion of this evidence. On the contrary, he maintains that the "defendant has proved all of his twelve pleas, any one of which would be fatal to a recovery of the plaintiffs." The record shows that the defendant was allowed to testify substantially in respect of the matters contained in the defendant's offers of evidence. The defendant testified as follows: "I drove over there to look at the corner. I could not find it measured up, the street did not measure up to what they told me it was. Then I looked at

the contract and I found it was a different corner. I inquired where the property was, and I drove over there. It was eight blocks from the Loyola station, near Devon and Clark streets." The defendant also testified that the property was not suitable for a high-grade apartment building; and later when counsel for the defendant made an offer to prove by the defendant that the property "was wholly unsuitable for" a high-grade apartment building, the court said "You have proved that. I will admit it was not."

It is not contended by counsel for the defendant that the matters contained in the evidence which was excluded were direct issues in the case; but counsel contends that all of this evidence which was excluded was in the nature of corroborative testimony; that it tended to prove the falsity of the representations of Kennedy and Lind; that the defendant relied on the false representations of the plaintiffs, and would not have made the exchange of properties but for such false representations.

We do not think that the exclusion of the evidence would justify us in reversing the judgment. The relevancy of the excluded evidence is too slight and remote. Furthermore, as we have shown, a substantial part of the excluded evidence was testified to by the defendant. We do not think that the admission of the evidence would have had any material influence on the result of the trial. Town of Harmony v. Clark, 250 Ill., 57, 62.

Counsel for the defendant further contend that the court erred in ruling on the propositions of law.

As we are of the opinion that the judgment of the trial court was in accordance with the law and the evidence, it is immaterial whether the court ruled correctly on the propositions of law. Commercial State Bank of Forreston v. Folkerts, 200 Ill.

the continent and [illegible]
where [illegible]
blocks from the [illegible]
The defendant [illegible]
for a hit-and-run [illegible]
the defendant [illegible]
property was [illegible]
building, the [illegible]
it was not.

[illegible]
that the [illegible]
were direct [illegible]
able and [illegible]
tive [illegible]
examination [illegible]
the [illegible]
made the [illegible]
sions.

[illegible]
would [illegible]
evidence [illegible]
have been, [illegible]
sified in [illegible]
of the [illegible]
man or [illegible]

[illegible]
court [illegible]

[illegible]

trial [illegible]
the [illegible]
of law. [illegible]

App., 385, 391, 392; Fuchs & Lang Mfg. Company v. R. J. Nittredge & Company, 146 Ill. App., 366, 371; Stone v. Sulzbine, 119 Ill. App., 443, 456.

For the reasons stated the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

App., 388, 391, 397; Jones v. Lee Life Assurance Co. of Kentucky & Commerce, 140 Ill. App., 387, 391; Guinn v. Anderson, 139 Ill. App., 443, 456.

For the reasons above set forth the judgments in all three cases are affirmed.

AFFIRMED.

Matthews, P. J., and Scanlan, J., concur.

30068

215 - 30068

DAISY H. HARTS,
Appellant,

vs.

ARNOLD BROTHERS, a
Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 675

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago brought by Daisy H. Harts, plaintiff, to recover solicitor's fees incurred by the plaintiff in prosecuting a suit in equity against the defendant to recover damages for waste alleged to have been committed by the defendant in making alterations on premises leased to the defendant by the plaintiff. The suit in equity was begun before the expiration of the lease.

The hearing in the Municipal court in the action for solicitor's fees was had before the court without a jury. The lease provided that the lessee should pay all costs, attorney's fees and expenses that should arise from enforcing the covenants of the lease by the lessor. The lease also provided as follows: "The lessee having made alterations in said premises during its present tenure thereof, agrees to restore the said premises at the termination of the lease to their original condition as required, less reasonable wear and tear." The court found in favor of the defendant. From the judgment of the court on the finding the plaintiff has prosecuted the present appeal.

After the action was begun in the Municipal court the suit in equity, which had been brought by the plaintiff to recover damages for the alleged acts of waste, was appealed to the Supreme court. On the appeal (Harts v. Arnold Brothers, 318 Ill., 416, 419, Advance Sheets) the Supreme court decided that

218 - 30028

DAISY E. RAPPS, Appellant,	
vs.	
AEROLD BROTHERS, a Corporation, Respondent.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 278

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT:

This is an action in the municipal court of Chicago brought by Daisy E. Rapps, plaintiff, to recover antidotrin fees incurred by the plaintiff in prosecution a suit in which certain the defendant to recover damages for wrongs alleged to have been committed by the defendant in making alterations on premises leased to the defendant by the plaintiff. The suit in equity was begun before the expiration of the lease.

The hearing in the municipal court in the action for antidotrin fees was had before the court without a jury. The lease provided that the lessee should pay all costs, attorneys fees and expenses that should arise from enforcing the covenants of the lease by the lessor. The lease also contains as follows: "The lessee having made alterations in said premises during the present tenure thereof, agrees to restore the said premises at expiration of the lease to their original condition. A reasonable lease reasonably was and lease." The court found in favor of the defendant. From the judgment of the court on the pleading the plaintiff has prosecuted the present appeal.

After the action was begun in the municipal court the suit in equity, which had been brought by the plaintiff to recover damages for the alleged breach of covenants, was upon to the Supreme court. In the opinion (Aerolo v. [illegible], 3.2 Ill., 410, 410, Advance Sheets) the Supreme court decided that

according to the terms of the lease the parties recognized the right of the defendant Arnold Brothers "to make changes on condition that the defendant restore the premises at the close of the tenancy;" that in such a situation the plaintiff was not "entitled to recover during the term of the tenancy for any damages except that resulting to the reversion;" and that "no evidence appears to have been offered of injury to the reversion by reason of the alterations complained of."

In view of the decision of the Supreme court we are of the opinion that the plaintiff is not entitled to recover solicitor's fees.

The judgment of the Municipal court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

according to the terms of the lease the parties recognized the right of the defendant Arnold Brothers "to make changes on condition that the defendant restore the premises at the close of the tenancy;" that in such a situation the plaintiff was not "entitled to recover during the term of his tenancy for any damages except that resulting to the reversion;" and that "no evidence appears to have been offered of injury to the reversion by reason of the alterations complained of."

In view of the decision of the Supreme Court we are of the opinion that the plaintiff is not entitled to recover solicitor's fees.

The judgment of the Municipal Court is affirmed.

ORDERED.

Hatchett, P. J., and Lehmann, J., concur.

216 - 30069

IDA REEVES,
Appellant,

vs.

CHICAGO MUTUAL LIFE COMPANY,
a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

240 I.A. 676

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action in the Municipal court of Chicago brought by Ida Reeves, the plaintiff, against the Chicago Mutual Life Company, the defendant, to recover $1000 as beneficiary under an insurance policy issued by the defendant on the life of her husband, William H. Reeves, deceased.

The statement of claim, as set out in the abstract of the defendant, is as follows:

"That defendant owes plaintiff $1000 for reasons following: that on the 28th of November, 1923, it issued and delivered to William H. Reeves their policy No. 3211, copy of which is attached; that pursuant to said policy, premium of $12.30 became due on the 28th of February, 28th of May, 28th of August, and 28th of November of each year; that policy was sold by one A. V. Langworthy at Grand Haven, Michigan; that said Langworthy was then General Agent of the Company and continued to be during all times mentioned in Statement of Claim; that neither plaintiff nor insured ever had notice of any termination of his authority; that plaintiff is the beneficiary in policy; that on the 28th of May, 1924, a premium became due; that on that day the insured was injured from which injury he died on the 15th of July, 1924; that on the 5th of July, there was forwarded to said Langworthy the said premium by means of a United States Postal Money Order made out to the Chicago Mutual Life Company; that the delay in forwarding was due to the excitement attendant upon insured's injuries; that on the 6th of July said Langworthy received said money order; that when he so received it, he knew and because of his knowledge, the defendant knew of insured's injury; that defendant knew the conditions in the said policy in re 'grace' in payment of premiums and the matter of 'complete default;' that it through said Langworthy accepted said money order without qualification or condition as indicated by a letter received from said Langworthy, copy of which is attached, marked Exhibit 'B'; that said letter read among other expressions:

'Grand Haven, Michigan,
July 9, 1924.

Dear Mrs. Reeves:
Money received O. K. on Mr. Reeves' premium.
(Signed) A. V. Langworthy.'

[illegible] - [illegible]

IDA REEVES, Appellant,	
vs.	
CHICAGO MUTUAL LIFE COMPANY, a Corporation, Appellee.	

[illegible]

24013.678

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an action in the municipal court of Chicago brought by Ida Reeves, the plaintiff, against the defendant Chicago Life Company, the defendant, to recover $[illegible] on a certificate under an insurance policy issued by the defendant on the life of her husband, William C. Reeves, deceased.

The statement of claim, [illegible] the statement of the defendant, [illegible] as follows:

[illegible] that on the 3rd of November, 1907, it issued an insurance to William C. Reeves [illegible] policy, [illegible] in attached; that premiums [illegible] policy, proof of [illegible] on the 5th of [illegible], 5th of May, [illegible] and 28th of November of each year; that policy was [illegible] V. Dougherty at Cook's Farm, Wisconsin; that [illegible] was then General Agent of the Company [illegible] ing all times [illegible] plaintiff [illegible] this authority; [illegible] that on the 14th of July, 1909; that on the 3rd of July, [illegible] to said Lodge [illegible] Postal Money Order made [illegible] that the policy [illegible] upon insured's injuries; that on the [illegible] of July [illegible] received said money order; that [illegible] and because of his [illegible] injury; that defendant knew [illegible] in the 'grace' in payment of premiums and that it is [illegible] default;' that it through said Dougherty [illegible] order without qualification [illegible] for received from said Dougherty, copy [illegible] marked Exhibit "A"; that [illegible] alone:

"Fort Sill, Oklahoma,
July 9, 1910.

Fort Sill, Reeves:

Money received [illegible] on account. Reeves' premium.

(Signed) [illegible]

"That neither the insured nor plaintiff remembered the exact due date or the days of grace and when the premium was forwarded, on to-wit, July 5, 1924, the plaintiff and insured believed the policy in full force; that the remittance was made in good faith and was as aforestated accepted without reservation or qualification; that the company through its own conduct and the acts, conducts and declarations of its general agent waived all conditions in said policy in re days of grace and in re 'complete default' and reinstatement thereunder; that the said Company through its agent accepted said money with full and complete knowledge of the forfeiture, if any, and is estopped from claiming a forfeiture; that notice of death within thirty (30) days was given the defendant; that within six months of the death proofs thereof were submitted to defendant; that demand was made of the defendant to pay the $1,000 and that it refused so to do; therefore, plaintiff sues."

Attached to the statement of claim is the following affidavit:

"Ida Reeves, being sworn, says she is plaintiff and knows the facts; that the cause is a suit upon contract for the payment of money; that the nature of the demand is as stated in Statement of Claim and that there is due from the defendant $1000."

The defendant filed an affidavit of merits, which as set out in the abstract is as follows:

"Harry C. Richards makes oath and says he is Secretary of the defendant, and admits that on November 25, 1925, it issued policy to William H. Reeves as alleged in Statement of Claim, the premiums becoming due as therein stated; that on the 28th day of May, 1924, premium became due and that it was not paid nor was it paid within thirty days, nor was it ever paid to the defendant; defendant does not know except from Statement of Claim whether Reeves was injured as stated or whether $12.30 was forwarded to Langworthy as stated. Defendant denies that Langworthy on the 5th of July, 1924, or at any time before or since was the General Agent of this defendant; alleges that Langworthy was a mere soliciting agent at one time long prior to said 5th day of July, 1924. As such he solicited and obtained applications for policies of insurance, but that he had no authority nor was any delegated and as far as defendant is advised, Langworthy did not hold himself out to the public to have authority to waive any of the provisions of the insurance policies issued by defendant. That if Langworthy received such remittance, he never forwarded same to defendant and defendant never received payment thereof as required by the terms of the policy. Stated on information and belief the fact to be that Langworthy did receive such remittance of $12.30 from Reeves during his lifetime and after complete default of said policy No. 3211, according to the terms thereof for failure to pay the premium due on the 28th of May, 1924; but he held same pending submission of proof by said Reeves of his insurability satisfactory to the officers of the company, but without knowledge, consent or authority of defendant, and that at that time defendant had no notice or knowledge that Reeves had suffered any injury nor did Langworthy have notice or knowledge of the seriousness of the injury. Alleges that insured fraudulently and in bad

faith failed to disclose to Langworthy the seriousness of the injuries; that it was plaintiff's duty and of insured to have disclosed said facts and to submit to re-examination as well as to make past due payments. That plaintiff fraudulently conspired with insured to conceal the true facts in an attempt to work an implied waiver by acceptance of payment of past due premiums, but which past due premiums were never accepted; denies that any proofs of insurability of said Reeves were submitted to the officers of defendant company and that said policy was never recognized nor an application for such purpose ever made. Denies that payment of the May 28, 1924, premium was paid to or accepted by the defendant, and denies that through any conduct of it or of its authorized agent, it waived the conditions relative to days of grace and complete default and reinstatement, and denies that Langworthy had any authority to waive any such provisions, and denies owing plaintiff anything."

The case was heard before the court without a jury and the court entered judgment in favor of the defendant. From the judgment the plaintiff has prosecuted this appeal.

It will be observed that on the pleadings the precise issue is whether the payment of the premium of $12.30 to Langworthy on July 5, 1924, after the plaintiff was in "complete default," constituted an acceptance of the premium by the defendant, and a waiver of the default such as to estop the defendant from claiming that the policy of insurance was forfeited by the plaintiff.

In the brief of counsel for the plaintiff, however, additional issues are raised and argued. Counsel for the plaintiff contends that the insured was not in default when the premium of July 5, 1924, was paid; that the policy of insurance did not contain a provision "for an automatic lapse upon non-payment of premium;" that therefore it became necessary for the defendant "to declare a forfeiture;" that "the mere declaration of a forfeiture would not avail the defendant unless" the defendant "could show that it had brought home to the knowledge of the insured" during his lifetime that the defendant "had forfeited his policy" and had "declared and elected to treat the insurance policy as cancelled;" that the defendant did not do any of these things and that consequently the policy of insurance remained in force and there was no default on

July 5, 1924; that furthermore the policy of insurance provided that 'credit balances' might be established "in favor of the insured," and that "any credit balance" might be applied to cover premiums and thus prevent forfeitures; that the insured gave Langworthy a note which paid for more than six months insurance; that "the record is silent as to how much more than six months insurance" the note "paid for" and is also "silent as to how much, if any, credit balance stood on the books of the company in favor of the insured;" that also on "July 7 or 8, 1924, when Langworthy received the July 5, 1924, remittance, the days of grace on the May 28, 1924, premium were just seven days gone;" that "bearing all these things in mind ** the record will not disclose affirmatively that (taking into consideration the credit balance, if any, the over plus of premium contemplated by the note) the policy of the insured was at the time of the remittance July 5 or 6, 1924, in default." "Such is this case" say counsel for the plaintiff, "aside from the question of waiver and estoppel."

Counsel for the defendant contend that on the pleadings it is not permissible for the plaintiff to raise the questions in regard to forfeiture and credit balances; that if issues had been made in these respects on the pleadings, the defendant might have proved that notice of default was given, and that there was no credit balance which would carry the premium beyond the end of the second quarter; that according to the elementary principles of pleading, as announced in the case of Feder v. Midland Casualty Company, 316 Ill., 552, 558, 559, a plaintiff can recover only on the case made in his declaration; that he cannot make one case by the allegations in his declaration, and recover on a different case made by the proof.

July 9, 1958; that [illegible] that "credit [illegible]" [illegible] insured," [illegible] cover [illegible] gave [illegible] moreover, [illegible] months [illegible] how much, [illegible] pany in [illegible] when [illegible] of grace [illegible] that [illegible] disclose [illegible] balance, if [illegible] note) [illegible] July 9 [illegible] for the [illegible] lapsed."

[illegible] ings [illegible] in [illegible] been made [illegible] have [illegible] no [illegible] the [illegible] of [illegible] Depart[illegible] the [illegible] the [illegible] cate [illegible]

Counsel for the plaintiff maintain that the rule announced in the case of Feder v. Midland Casualty Company, supra, applies only to common law pleadings and not to pleadings in the Municipal court. Counsel are in error.

It has been expressly held that the rule applies to pleadings in the Municipal court. Walter Cabinet Company v. Russell, 250 Ill., 426; Gillman v. Chicago Rys. Company, 268 Ill. 305, 310; Sutton v. Chicago Rys. Company, 174 Ill. App. 316, 318; Donaldson v. Wellington Hotel Company, 175 Ill. App. 623, 625; Guerra v. Rocco, 181 Ill. App. 528, 529; Isbitz v. Chicago City Rys. Company, 192 Ill. App. 487, 495.

In the case of Walter Cabinet Company v. Russell, supra, the court said (pp. 420, 421):

> "The object of the rules requiring statements of claim and of set-off is to inform the parties of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in the municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement. The issue can not be enlarged by oral claims or affidavits filed in the case."

The only questions which we think we should consider in the case at bar are those raised by the pleadings in regard to waiver and estoppel. In our view of the case for the sake of argument it may be assumed, in determining those questions, that Langworthy was the general agent of the defendant, and that the payment to him of the premium of $12.30 on July 5, 1924, was equivalent to a payment to the defendant.

On May 28, 1924, the insured, who was a decorator, fell from a scaffold while painting a house and broke his back. He was taken to a hospital where he remained two weeks and was then taken to his home. As a result of the accident he was paralyzed from the hips down, and on July 5, 1924, he died. The plaintiff testified that the doctors gave her hope at first that

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Counsel for the plaintiff maintain that the rule was announced in the case of Baker v. William Campbell Company, supra, applies only to common law pleadings and not to those in the municipal court. Counsel are in error.

It was then conceivably held that the rule applies to pleadings in the municipal court. Valley Cottage Company v. Tuckett, 290 Ill., 496; Gilman v. Chicago Rys. Company, 268 Ill. 305, 310; Mutton v. Chicago Rys. Company, 171 Ill. 290, 291, 318; Donaldson v. Washington Hotel Company, 174 Ill. 29, 205, 208; Guerra v. Bacon, 141 Ill. 289, 288, 289; Lehlen v. Union & City Rail Company, 102 Ill. 498, 497, 499.

In the case of Valley Cottage Company v. Tuckett, supra, the court said (p. 497, 498):

> "The object of the rules requiring a statement of claim and of set-off is to inform the opposite of the nature of the respective claims, and while the formalities of pleading have been abolished by statute, it is still the law in our municipal court, as in other courts, that the duty is upon the plaintiff, at the outset, to inform the defendant of the claim he means to make and in his statement must recover upon proof of an entirely different cause of action. The issue is made by the statement of claim, and the evidence must be limited by that statement. The issue can not be enlarged by oral claims or affirmative claims in the nature of

The only question which we have to decide is whether in the case at bar the cause raised by the pleadings is varied to waive and estoppel. In our view of the case the question of estoppel it may be conceded, in determining issue of liability, Mr. Sherworthy was the general agent of the defendant, and that the payment to him of the premium of $1.00 on July 6, 1926, was known that to a payment to the insured.

On May 24, 1926, the insured, who was a doctor, fell from a scaffold while painting a long distance from the ground. He was taken to a hospital where he remained two weeks. When taken to his home. As a result of his accident he was paralyzed from the hips down, and on July 6, 1926, he died. The plaintiff testified that the doctors told her some at first that

her husband "would get up;" that they gave her hope for more than two weeks after he was injured; that the doctors thought that his spine was not totally broken and nature would adjust it, and that he would live but would be permanently crippled; that she did not cease to have hope for his recovery "up until the last week of his life."

On July 5, 1924, the plaintiff wrote the following letter to Langworthy, at Grand Haven, Michigan:

> "Enclosed find $12.30 the premium due on Wm. H. Reeves insurance. Russell and I will send ours very shortly. I don't know just when they are due and have moved so thought I would send Mr. Reeves now and let you know the address. Mr. Reeves met with an accident a few weeks ago and is still confined to his bedm but we are hoping to have him about before long."

On July 9, 1924, Langworthy wrote a letter to the plaintiff in reply, in which he stated: "Money received O. K. on Mr. Reeves premium." In the letter he also said: "I was just informed by the cashier of Peoples Bank here they were about to start action to collect the money they loaned you when I delivered your policies last fall, I endorsed your note and now they inform me you defaulted in your note, so I must pay it for you. Mrs. Reeves, I wish you would at least pay the interest and renew the note, thus save me a burden, as I have all I can do to take care of my family of three. Mr. Hoffman tells me you folks are alright as for credit and cannot understand why you do not do something about these notes, please let me hear from you by return mail before your note affair goes to court. Next Monday is a meeting of the directors of the bank and if you can get me a letter before or on that day as to what you intend to do, I'll take it up with the bank and try to settle the matter out of court. Please answer this immediately and I will thank you very much."

The night that Reeves died, namely, July 15, 1924, the plaintiff notified Langworthy of his death by a telegram.

Mr. Burdoch "would say to me," that they [illegible] two weeks after he was injured; [illegible] his entire [illegible] was not totally broken [illegible] that he would live but would be permanently [illegible] did not cease to give care for the remainder of the [illegible] week of his life."

On July 5, 1944, the [illegible] letter to Longworthy, [illegible]:

> "Enclosed find file [illegible] insurance. Hound [illegible] know just when they are [illegible] said Mr. Jones [illegible] met with an accident a few weeks ago [illegible] his body [illegible]

[illegible] plaintiff in [illegible] Mr. Burdoch [illegible] informed by the [illegible] state entitled to collect [illegible] your position last [illegible] as you do within [illegible] Jones, I wish you would [illegible] note, thus [illegible] of my family [illegible] as for [illegible] about [illegible] have your [illegible] the [illegible] on that [illegible] back and [illegible] this [illegible]

The [illegible] plaintiff noticed [illegible]

July 16, 1924, Langworthy wrote to the plaintiff as follows:

> "I was very sorry to receive your wire advising me of the death of Mr. Reeves, your letter of a few days ago did not intimate that the accident was at all serious. Aside from it being a very great shock to me I feel very badly the circumstances that make it necessary for me to return the amount of money sent me under date of July 5, 1924. You will see by the date of his insurance policy that the last day of grace for payment of his premium was June 29, 1924. And in order for him to be reinstated he would have to fill out an application for reinstatement and same would have to be passed on by officers of the company. I cannot tell you how bad I feel about this but there is nothing I can do as your policy states method of reinstatement in case a policy holder does not pay premium when due or during grace period. If I can be of any assistance, do not fail to call on me. I advised the paper of Mr. Reeves death. Again extending sympathy to the entire family I remain."

The books of the defendant showed that the policy of insurance was forfeited on February 28, 1924, for non-payment of the second quarterly premium.

In the insurance policy a paragraph marked "Reinstatements" provided as follows:

> "In the event of complete default, this policy may be reinstated any time upon proof of the insurability of the insured satisfactory to the officers of the Company and upon the payment of all past due premiums remaining unpaid with interest at the rate of 6% per annum."

The evidence does not show that proof was made of the insurability of Reeves under the above paragraph.

It is the contention of counsel for the plaintiff "that Langworthy, on behalf of the company, immediately accepted the remittance of July 5, 1924, without reservation and with knowledge that the insured was injured; that he thereby, for the company, waived the time of the payment of the premium and waived proof of insurability on the part of the insured."

Counsel for the defendant maintain that there was no waiver by the defendant; and furthermore they assert that the defendant is not estopped to claim the forfeiture of the policy as "in reality Reeves lost nothing by going to his death with the conviction that the policy was in full force and effect;" that Reeves

July 16, 1931, [illegible] to the [illegible] as follows:

"I was very sorry to receive [illegible] yesterday [illegible] of the death of Mr. Hoover, your letter of a few days ago was not received until the [illegible] was I will explain. [illegible] it was being a very great shock to me I feel very [illegible] circumstances that make it necessary for me to review the amount of money next as [illegible] July 6, 1931. You will see by the date of his insurance policy that the [illegible] of this payment of his premium was [illegible] 6, 1931. [illegible] to be reinstated [illegible] I will not be satisfied [illegible] insurance and [illegible] to be passed on by officers of the company. I [illegible] you [illegible] I feel about this [illegible] there is nothing I can do on your policy [illegible] insurance in case a policy [illegible] due or during grace period. [illegible] do not fail to call on me. I [illegible] death. Again [illegible] I remain."

The [illegible] insurance [illegible] the accepted [illegible] in the insurance policy [illegible] "Reinstatements" provided as follows:

"In the event of default [illegible] insured may [illegible] proof of [illegible] satisfactory to the [illegible] payment of all [illegible] at the rate of [illegible]."

The evidence [illegible] insurability of [illegible].

[illegible]

"The [illegible] the conditions of July 6, 1931 [illegible] knowledge that the insured was insurable; that he [illegible] company, waived the [illegible] proof of insurability on the part of the insured."

[illegible]

waiver by the [illegible] reference is not entitled to claim the [illegible] "in reality [illegible] violation that the [illegible]

"was on his deathbed when it was sought to revive the policy by making the past due payment, and even if at once notified of the refusal of the company to reinstate he could not have obtained insurance elsewhere; that estoppel is based upon the fact of a loss which might have been recouped except for the misleading conduct of the party so estopped."

We are of the opinion that the question in the case at bar is not one strictly of estoppel in the sense that plaintiff must show that Reeves was misled to his prejudice, or that his position was disadvantageously altered by the conduct of the defendant. In our view, although there are some elements of estoppel involved, the question is one of waiver; that is, whether the defendant voluntarily and knowingly surrendered a right which the defendant was entitled to exercise according to the provisions of the policy of insurance, and thereby became estopped from claiming that the policy was forfeited.

The distinction between waiver and estoppel is most excellently stated in the Encyclopaedia of Law and Procedure, as follows (vol. 40, pp. 255, 258):

> "While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable terms. It is difficult to make a distinction between waiver and estoppel which will give to each a clear legal significance and scope, separate from and independent of the other, as they are frequently used in the cases as convertible terms, especially as applied to the law of insurance contracts and in the avoidance of forfeitures. There are, however, several essential differences between the two doctrines. Waiver is the voluntary surrender of a right; estoppel is the inhibition to assert it from the mischief that has followed. Waiver involves both knowledge and intention; an estoppel may arise where there is no intent to mislead; waiver depends upon what one himself intends to do; estoppel depends rather upon what he caused his adversary to do; waiver involves the acts and conduct of only one of the parties; estoppel involves the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice or into an altered position, an estoppel always involves this element. Estoppel results from an act which may operate to the injury of the other party; waiver may affect the opposite party beneficially. Estoppel may carry the implication of fraud; waiver does not. Estoppel may arise

"was on his deathbed when it was sought to revive the policy by making the past due payment, and even if he is entitled to the refusal of the company to reinstate he could not have obtained insurance elsewhere; that argument is based upon the fact of a loss which might have been recouped except for the misleading conduct of the party so estopped."

We are of the opinion that the question in the case at bar is not one strictly of estoppel in the sense that plaintiff must show that Reeves was misled to his prejudice, or that his position was disadvantageously altered by the conduct of the defendant. In our view, although there are some elements of estoppel present, the question is one of waiver; that is, whether the defendant voluntarily and knowingly surrendered a right which it would otherwise have had to exercise according to the provisions of the policy contract, and thereby became estopped from claiming [illegible].

The distinction between waiver and estoppel is most excellently stated in the Encyclopedia of Law and Procedure, as follows (vol. 4, pp. 255, [illegible]):

> "While waiver belongs to the family of estoppel, and the doctrine of estoppel lies at the foundation of the law of waiver, they are nevertheless distinguishable, and it is [illegible] to make a distinction between waiver and estoppel [illegible] to each a clear legal significance [illegible] independent of the other, as they are frequently used in the cases as convertible terms, especially in the law of insurance contracts and in [illegible]. There are, however, several essential differences between the two terms. Waiver is the voluntary [illegible] is the limitation or [illegible] allowed. Waiver involves both knowledge and intention [illegible] only when [illegible] upon [illegible] upon [illegible] acts and conduct of only one of the parties; [illegible] the conduct of both. A waiver does not necessarily imply that one has been misled to his prejudice [illegible] an estoppel always involves [illegible] as and [illegible] may [illegible] the implication of fraud; [illegible]

as between consistent remedies, for waiver by election to operate as a bar, the remedies must be inconsistent. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. The most general distinction lies in the fact that the term 'waiver,' besides implying an intention on the part of a party to relinquish a right which is not necessarily present in estoppel, refers only to the act or consequence of the act of the party against whom the waiver is sought to be enforced, regardless of the attitude assumed by the other party, whereas estoppel arises where, by the fault of one party, another has been induced, ignorantly or innocently, to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to assert the right in controversy. The distinction is more easily preserved in dealing only with express waiver, but where the waiver relied upon is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there are not present some of the elements of estoppel."

To the same effect substantially is 27 Ruling Case Law, section 2, pp. 904, 905:

"According to the generally accepted definition a waiver is the intentional relinquishment of a known right. It is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on. The terms 'estoppel' and 'waiver' are sometimes loosely used interchangeably, but though a waiver may be in the nature of an estoppel and maintained on similar principles, they are not convertible terms, and the distinction between them is one easy to preserve when express waivers are under consideration. As already seen, a waiver is an intentional relinquishment, while the indispensable elements of an estoppel are ignorance of the party who invokes the estoppel, a representation by the party estopped which misleads, and an innocent and deleterious change of position in reliance on that representation. It is, however, unquestionably true that the dividing line between waivers implied from conduct and estoppels often times becomes so shadowy that in the law of insurance the two terms have come to be quite commonly used interchangeably. When the term waiver is so used, however, the elements of an estoppel always invariably appear, and it is quite apparent that it is employed to designate, not a pure waiver but one which has come into an existence of effectiveness through the application of the principles underlying estoppels."

It is the rule that a waiver is not to be inferred from an act done under a misapprehension of the rights of the parties at the time. Miller v. Union Central Life Insurance Company, 110 Ill., 102, 107; Seaback v. Metropolitan Life Insurance Company, 274 Ill., 516, 520.

as between contracting [illegible] for waiver [illegible] the two differ [illegible] may be proved by [illegible] create a technical estoppel. [illegible] used in the first sense the term 'waiver' [illegible] intention on the part of a party [illegible] not necessarily proof [illegible] consequence of the act of the party against whom the waiver is sought to be enforced, regardless of [illegible] by the other party, whereas [illegible] fault of one party, another has been [illegible] innocently, to change his position [illegible] that it would operate as a virtual fraud upon [illegible] the party by whom he has been misled to assert the right in controversy. The distinction [illegible] dealing only with express waivers, but where the waiver relied upon is constructive, or merely implied from the conduct of a party, irrespective of what his actual intention may have been, it is at least questionable if there is not present some of the elements of estoppel."

To the same effect [illegible]

Law, section 2, [illegible]

"According to the generally accepted definition [illegible] in the technical [illegible] It is a voluntary act, and implies [illegible] by the party [illegible] of [illegible] which [illegible] The terms 'estoppel' and 'waiver' [illegible] interchangeably [illegible] estoppel and waiver [illegible] convertible terms, and [illegible] to preserve when express waivers [illegible] as already [illegible] the indiscriminate [illegible] party [illegible] waiver [illegible] of [illegible] even, [illegible] are implied [illegible] speaks [illegible] shadowy that in the law [illegible] be quite [illegible] is [illegible] partially [illegible] to distinguish [illegible] unless [illegible] principles underlying [illegible]"

It is [illegible]

from an act done [illegible]

parties at the time. [illegible]

[illegible]

[illegible]

There can be no waiver unless the waiver is distinctly made with full knowledge of the rights intended to be waived. Ferrero v. Knights of Security, 309 Ill., 476, 481; 27 Ruling Case Law, section 5, pp. 908, 909; 40 Cyclopaedia of Law and Procedure, pp. 258, 259.

The question of waiver is mainly a question of intent which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and must always be intentional. Since intent is an operation of the mind, intent should be proved and found as a fact, and is rarely to be inferred as a matter of law. 40 Cyclopaedia of Law and Procedure, pp. 261, 262, 263. The burden of proof rests upon the party claiming the waiver. Ferrero v. Knights of Security, supra, (p. 481); Seaback v. Metropolitan Life Insurance Company, 274 Ill., supra. The waiver must be clearly proved. 27 Ruling Case Law, section 6, p. 910; 4o Cyclopaedia of Law and Procedure, p. 269.

In the case at bar the evidence shows that the defendant did not have full knowledge of the physical condition of Reeves when the payment of the premium of July 5, 1924, was made. On the contrary, the only knowledge that the defendant had at that time in regard to the accident and injuries of Reeves was the information obtained from the plaintiff's letter to Langworthy, in which the plaintiff stated that Reeves "met with an accident a few weeks ago and is still confined to his bed, but we are hoping to have him out before long." Langworthy was not informed by the plaintiff that Reeves' back was broken and that he was paralyzed from the hips down, although the plaintiff knew these facts. From July 5, 1924, the date of the plaintiff's letter to Langworthy, to July 15, the date of the plaintiff's telegram notifying Langworthy of the death of Reeves, Langworthy had received no information of the condition

There are [illegible] the water or [illegible]
made with full knowledge [illegible] the [illegible] to be [illegible].
Fairman v. [illegible], [illegible], [illegible], [illegible], [illegible]
Law, section [illegible], [illegible], [illegible]; [illegible], [illegible],
pp. 285, 290.

The [illegible] is [illegible]
which lies at the foot [illegible]. [illegible]
fested in some [illegible] [illegible]
since taken as an [illegible] [illegible]
and found as a fact, and is [illegible]
law. [illegible], [illegible], [illegible]. The
burden [illegible]
v. [illegible]
[illegible], [illegible]. [illegible]
clearly proved. [illegible], [illegible], [illegible]
peals of [illegible], [illegible], 1892.

In the case [illegible]
not [illegible]
when the [illegible] [illegible]
contract, [illegible]
in [illegible]
tion [illegible]
the plaintiff [illegible]
age not [illegible]
out being [illegible]
[illegible]
[illegible]
the [illegible]
[illegible]
of course, [illegible]

of Reeves; and from the information contained in the plaintiff's letter of July 5, 1924, Langworthy reasonably would have inferred that Reeves' condition was not serious. Immediately upon receipt of the telegram notifying him of Reeves' death, Langworthy returned to the plaintiff the amount of the premium which the plaintiff had sent to him in the letter of July 5, 1924.

Assuming, for the sake of argument, as we have assumed, that the payment of the premium sent by the plaintiff on July 5, 1924, to Langworthy, was a payment to the defendant, nevertheless we are of the opinion that in the circumstances the temporary retention of the premium by Langworthy was not such an acceptance of the premium as to constitute a waiver by the defendant of the provision in the policy of insurance relating to reinstatements after default in the payment of premiums.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

of Heaven, [illegible]

letter of July 5, 1924, [illegible]

Terms for Reserve [illegible]

upon receipt [illegible]

Langworthy returned [illegible]

which the [illegible]

1924.

[illegible]

answer, and the [illegible]

on July 5, 1924, [illegible]

reservations on the [illegible]

temporary [illegible]

acceptance of [illegible]

terms of [illegible]

relinquishment [illegible]

[illegible]

[illegible]

[illegible]

Matthews, [illegible]

234 - 30087

MARK LEVY and ARTHUR G. LEVY,
Co-partners Doing Business
as Mark Levy & Brother,
Appellees,

vs.

ETHEL F. LIPSEY and DAVID LIPSEY,
Appellants.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

240 I.A. 676

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought in the Circuit court of Cook County by Mark Levy and Arthur G. Levy, jointly, as co-partners, doing business as Mark Levy & Brother, against Ethel F. Lipsey and David Lipsey, to recover the sum of $6000 alleged to be due them from the defendants. The case was tried before a jury and the jury returned a verdict in favor of the plaintiffs in the sum of $6000.

The court entered judgment on the verdict. From the judgment the defendants have prosecuted this appeal.

The evidence shows without dispute that David Lipsey signed a written contract giving the plaintiffs the exclusive agency for six months to sell certain properties, among which was the property in question. This property was in the name of Lipsey's wife, the defendant, Ethel F. Lipsey. After about three months effort on the part of the plaintiffs to sell the property, during which time they were in almost daily communication with Lipsey through their salesman, Edwin M. Wolfe, the plaintiffs procured as prospective purchasers Richard M. Harvey and Clarence A. Dammarell, partners in the hotel business. Lipsey, his attorney, Samuel B. Epstein, Harvey, Dammarell, Wolfe, and Mark Levy met in the office of the plaintiffs to negotiate in regard to the terms of the sale. A contract for the sale of the property

SDM - 30947

MARK LEVY and [illegible], [illegible],
Co-partners doing business
as Mark Levy & Brother,
[illegible],

vs.

STEVE [illegible] and DAVID LEVY,
Appellees.

MR. JUSTICE [illegible] DELIVERED THE OPINION [illegible].

This is an action brought in the [illegible] court of Cook County by Mark Levy and [illegible] c. Levy, [illegible], as copartners, doing business as Mark Levy & Brother, against Gilpey and David Levy, to recover the [illegible] alleged to be due from the defendants. The case was tried before a jury and the jury returned a verdict in favor of the defendants in the sum of $[illegible].

The court [illegible] judgment on the verdict. [illegible] judgment the defendants [illegible] appeal.

The [illegible] alleged a written contract of [illegible] the existence agency for [illegible] the [illegible] day's [illegible] monthly [illegible] during which [illegible] Gilpey [illegible] produced as practically [illegible] A. Zemmerfl, [illegible] terry, [illegible] Levy met in the office [illegible] to the terms of [illegible] A [illegible] of the [illegible]

was prepared by Epstein. According to the terms of the contract the purchase price was $220,000, of which $50,000 was to be paid in cash, and the commission of the plaintiffs was fixed at $6600. All of the parties then went to the home of Lipsey to get Mrs. Lipsey to sign the contract.

The evidence in respect of what took place at Lipsey's home is conflicting. The substance of the testimony given on behalf of the plaintiffs by Harvey, Dammarell, Mark Levy and Wolfe was that Mrs. Lipsey insisted on a larger cash payment; that the cash payment was increased from $50,000 to $60,000; that Lipsey and Mrs. Lipsey considered the plaintiffs' commission of $6600 too high; that the commission was reduced to $6000; that Epstein made these changes in his own handwriting in the contract, which he had prepared in the plaintiffs' office; that Mrs. Lipsey requested that the contract be typewritten in accordance with the changes that had been made, and that it be brought to her the next day at one o'clock and she would sign it.

The testimony of Epstein, who was a witness for the plaintiffs, was substantially the same as the testimony of the above named witnesses for the plaintiffs, with the exception that Epstein did not recall any conversation regarding the commission.

The contract was typewritten and on the day following the negotiations at Lipsey's home was taken back to Lipsey's home at the time agreed on for Mrs. Lipsey to sign. In the meantime Mrs. Lipsey had gone to a hospital for the purpose of her confinement and had given birth to a child. Mrs. Lipsey refused to sign the contract. Lipsey, her husband, had previously signed the contract. Harvey and Dammarell gave two checks to the plaintiffs of $5000 each, drawn to the order of Mrs. Lipsey, as earnest money.

The only witnesses on behalf of the defendants were the defendants themselves. In regard to the negotiations at Lipsey's

was procured by Kasteln. [illegible] the price [illegible] months
the purchase price was $[illegible], or [illegible] in
in cash, and the remainder of the liability was fixed at
$6000. All of the parties [illegible] Mrs. [illegible] to
Mrs. Lipsey to plan the contract.

The material in respect of that [illegible] phase of [illegible]
home is conflicting. The defendants [illegible] gave [illegible]
half of the liability by larvey, [illegible], and [illegible]
was that Mrs. Lipsey [illegible] [illegible]
cash payment was increased from $[illegible] to $[illegible]
and Mrs. Lipsey can [illegible] the plaintiffs' contention [illegible]
too high; that the remainder was [illegible] to [illegible]
made these [illegible] [illegible] in the contract, which
be had proposed in the alternative [illegible]; that Mr. Larvey re-
quested that the contract be [illegible] [illegible] all the
changes that had been made, and that it be [illegible] the next
day at one o'clock [illegible].

The testimony of Spatain, who was a witness for the
plaintiffs, was [illegible] [illegible] the same as [illegible]
above [illegible] witnesses for the plaintiffs, [illegible]
Spatain did not really say [illegible]

The contract was [illegible] by [illegible]
the negotiations at [illegible] were taken [illegible]
at the [illegible] proved on Mr. Lipsey [illegible] Mrs.
Lipsey was [illegible] [illegible]
and had [illegible] [illegible]
contract. Lipsey, [illegible]
Larvey and [illegible]
each, [illegible]

The only witnesses [illegible]
defendants [illegible].

home they testified in substance that the plaintiffs were trying to induce Mrs. Lipsey to sign the contract but that she refused, and did not agree to sign it either the next day or at any time; that nothing was said about reducing the commission of the plaintiffs from $6600 to $6000; that Mrs. Lipsey was sick and went to the hospital that night.

The principal grounds on which the defendants rely for reversal are that the plaintiffs failed to prove that Arthur G. Levy, one of the plaintiffs and the partner of Mark Levy, had a State real estate broker's license; that under the State statute making it unlawful for a real estate broker to engage in business without a license, the broker's contract between the plaintiffs and the defendants was void as to Arthur G. Levy; that therefore the joint action of the plaintiffs cannot be maintained.

In our opinion a sufficient answer to the contentions of counsel for the defendants is that the question whether Arthur G. Levy had a State broker's license was not an issue.

The plaintiffs alleged in their declaration that they were duly licensed brokers. The defendants pleaded the general issue and filed an affidavit of merits. The affidavit of merits did not deny the allegation of the plaintiffs that they were licensed brokers, but placed the defense of the defendants on other grounds.

The rule is well settled that a defendant can prove only such defense as is stated in his affidavit of merits. Hunziker v. Mulcahey, 215 Ill. App. 508, 511; Reddig v. Looney, 208 Ill. App. 413, 416, 417; Miller v. Thomas, 200 Ill. App. 125, 129, 130.

Under the general rule of pleading in actions at law, everything which is not denied is by implication admitted to be true. Hopkins et al. v. Medley et al., 97 Ill. 402, 415; Simmons v. Jenkins, Admr., 76 Ill. 479, 482; Lettick v. Honnold, 63 Ill. 335, 336; Waggeman v. Lombard, 56 Ill. 42, 43.

[illegible] they testified in evidence [illegible] the defendants [illegible] to induce [illegible] Perry to sign the contract but [illegible] refused, and did not agree to [illegible] to deliver the [illegible] land; that nothing was said about [illegible] the [illegible] of the plaintiffs from 300 [illegible] by stating that Mr. Perry was also [illegible] went to the hospital that night.

The principal ground on which [illegible] relied for reversal was that the plaintiffs failed to prove that [illegible] G. Perry, one of the defendants who [illegible] Perry, had a State real estate broker's license; that under the [illegible] statute making it unlawful for a real estate broker [illegible] in business without a license, the contract [illegible] plaintiffs and the defendants was void [illegible] Perry; that therefore the joint action of the plaintiffs cannot be maintained.

In our opinion [illegible] of reversal for the defendants is [illegible] the operation of [illegible] Perry was a State broker's license was not, in fact.

The plaintiffs alleged in their [illegible] they were duly licensed brokers. The [illegible] the general [illegible] and filed in multiple of counts. The [illegible] not deny the allegation [illegible] brokers, but [illegible] the [illegible].

It is to said [illegible] only such defenses as [illegible] [illegible]

v. Mulvey, [illegible] 419, [illegible]; Miller v. Perry, [illegible] 111, [illegible], 1[illegible].

Under the [illegible] exercising which [illegible] not [illegible] by [illegible] case. Longley [illegible] v. Longley, [illegible] 1[illegible], [illegible] 229, [illegible]; Emerson v. [illegible], [illegible].

Counsel for the defendants contend that the allegation in the declaration of the plaintiffs that the plaintiffs were duly licensed brokers, is a conclusion of law and cannot be considered as properly pleading that the plaintiffs had a license; that, therefore, the declaration does not state a cause of action.

In our opinion the allegation in question is a conclusion of fact, or, in other words, an ultimate fact, and constitutes proper pleading.

It has been expressly held that an ultimate fact is a conclusion of fact. Brown v. City of Aurora, 109 Ill. 165, 167; Caywood v. Farrell, 175 Ill. 480, 482; Laughlin v. Horton, 267 Ill. 476, 484.

And the general rule is that only ultimate facts should be pleaded. 21 Ruling Case Law, section 3, p. 438.

Counsel for the defendants further assign error in regard to the instructions.

The instructions objected to are not set out in the brief. The rule is that the proper way to present instructions for consideration on review is to set them out in full in the brief. General Platers Supply Company v. Charles F. L. L'Hommedieu & Sons Company, 228 Ill. App. 201, 206. However, we have examined the instructions and we are of the opinion that no reversible error was committed by the court in the giving or the refusing of the instructions.

We do not think the verdict of the jury should be disturbed. It is the rule that "it is the most important function of the jury and their most peculiar province to determine the truth of the case." The People v. Boucher, 303 Ill. 375, 380, 381.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

Counsel for the defendants contend that the instruction in the declaration of the plaintiffs that the plaintiffs were duly licensed brokers, is a conclusion of law and cannot be considered as properly pleading that the plaintiffs had a license; that, therefore, the declaration does not state a cause of action.

In our opinion the allegation in question is a statement of fact, or, in other words, an ultimate fact, and constitutes proper pleading.

It has been expressly held that an ultimate fact is a conclusion of fact. Brown v. City of Detroit, 108 Mich. 117; Conrad v. Everett, 170 Ill. 49, 49; Cunningham v. Boston, 207 Ill. 476, 484.

And the general rule is that only ultimate facts should be pleaded. 21 Ruling Case Law, section 3, p. 426.

Counsel for the defendants further contend error in regard to the instructions.

The instructions cited also do not set out in the brief. The rule is that the trial court is entitled to instructions for consideration or review is to be taken out in full in the brief. General Electric Supply Company v. Crocker & Lewis Manufacturing Company, 220 Ill. App. 201, 204. However, we have looked at the instructions and we are of the opinion that no reversible error was committed by the court in the giving or refusing of the instructions.

We do not think the verdict of the jury was against the weight of the evidence. It is the rule that "it is a well established principle of the jury and their most peculiar province to determine the truth of the case." The People v. Jones, 291 Ill. 354, 358, 359. Matthews, P. J., and Kennedy, J., concur.

241 - 30094

ABRAHAM CLYMAN,
Appellee,

v.

ASHER R. GLUCK,
Appellant.

240 I.A. 676

APPEAL FROM
COUNTY COURT,
COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Asher R. Gluck, the defendant, from a judgment of the County Court of Cook County, on a verdict of a jury for $1000 in favor of Abraham Clyman, the plaintiff, in an action brought by the plaintiff to recover commissions for procuring a purchaser named Henry F. Knipp, alleged to have been ready, able and willing to buy certain property owned by the defendant.

The principal ground on which the defendant asks for a reversal is that Knipp did not comply with the agreement in regard to a deposit or "earnest money."

The evidence shows that the defendant and Knipp had agreed upon the terms of the sale, and had met together with Clyman in the office of Edward C. Dolan, the attorney for the defendant, to complete the details of the sale. It was agreed at this meeting that the attorney should prepare a contract for the sale of the property and that the parties to the contract should meet in the attorney's office the next day to sign the contract. The defendant called at the attorney's office the next day and told the attorney not to do anything further until the attorney heard from him; and the attorney notified Knipp that it would not be necessary for Knipp to come down to his office as the defendant "had called the deal off."

341 - 30094

ABRAHAM CLYMAN, Appellee,	
v.	
ASHER R. GILCOX, Appellant.	

MR. JUSTICE DONAHUE DELIVERED THE OPINION OF THE COURT:

This is an appeal by Asher R. Gilcox, the defendant, from a judgment of the County Court of Cook County, on a verdict of a jury for $1500 in favor of Abraham Clyman, the plaintiff, in an action brought by the plaintiff to recover commissions for procuring a purchaser named Henry F. Kelly, alleged to have been ready, able and willing to buy certain property owned by the defendant.

The principal ground on which the defendant claims for a reversal is that Kelly did not comply with the agreement in regard to a deposit of "earnest money."

The evidence shows that the defendant and Kelly had agreed upon the terms of the sale, and the contract was signed in the office of Clyman & Kelly, and the defendant, Gilcox, in order to secure the validity of the contract at this meeting, had the attorney who had prepared the contract for the sale of the property and that the parties to the contract should meet in the attorney's office the next day to sign the contract. The defendant called on the attorney's office the next day and told the attorney not to do anything further until the attorney heard from him; and the attorney testified Kelly that it would not be necessary for him to come down to his office as the defendant "had called the deal off."

The defendant contends that he refused to consummate the sale because at the meeting in the attorney's office Knipp failed to make the deposit agreed upon.

The plaintiff maintains that at the meeting in the attorney's office Knipp complied with the agreement in regard to the deposit.

The evidence in respect of the deposit is conflicting. Three witnesses, Clyman, Dolan and Knipp, testified on behalf of the plaintiff, as against the testimony of the defendant alone in his own behalf.

Clyman testified that Knipp had a certified check which he thinks was for $2500; that Knipp did not tender the check to the defendant.

Knipp testified that he had a personal check for the earnest money; that there was talk about $2500 earnest money as being five per cent of the purchase price; but that as the defendant was going to stay in possession for some time, he, Knipp, stated he would like to have the privilege of putting up $5,000 in bonds so that he would have the benefit of the interest until the deal was closed; that the defendant said that was satisfactory; that he, Knipp, had the money with which to get the bonds; that the morning after the meeting in the attorney's office he, Knipp, went to the Sheridan Bank to get the $5,000, and called the attorney on the 'phone.

Dolan testified that Knipp said he did not have any cash to put down but that he "would place in lieu thereof certain securities that could be put up in escrow with the Chicago Title and Trust Company;" that he, Dolan asked the defendant "if that was satisfactory" and that he said "yes provided the securities were of a merchantable kind;" that the defendant said he "would take cash or securities satisfactory to him;" that he, Dolan,

The defendant contends that he returned to consummate the sale because at the meeting in the attorney's office Knipp failed to make the deposit agreed upon.

The plaintiff maintains that at the meeting in the attorney's office Knipp complied with the agreement in regard to the deposit.

The evidence in respect of the deposit is conflicting. Three witnesses, Clymer, Bolan and Knipp, testified on behalf of the plaintiff, as against the testimony of the defendant alone in his own behalf.

Clymer testified that Knipp had a certified check which he thinks was for $4000; that Knipp did not return the check to the defendant.

Knipp testified that he had a personal check for the earnest money; that there was talk about earnest money as being five per cent of the purchase price, but that the defendant was going to stay in possession for some time. Mr. Knipp, stated he would like to have the privilege of putting up $5,000. In order that he would have the benefit of the interest until the deal was closed; that the defendant said that was satisfactory; that he, Knipp, had the money with which to get the bonds; that the morning after the meeting in the attorney's office he, Knipp, went to the Merchants Bank to get the $4,000, and called the attorney on the phone.

Bolan testified that Knipp said he did not have cash to put down but that he "would give to him the best certain security that could be right at hand, namely the Mills and Trust Company;" that he, Bolan, told the defendant "if that was satisfactory" and that he said "you provide the securities were of a merchantable kind;" that the defendant said he would take cash or securities satisfactory to him; that Mr. Bolan,

said that he "was acquainted with securities, being in a bank, and that he (the defendant) could rely on" his "judgment to pick out the securities which should be deposited."

The memoranda made by attorney Dolan as the data from which to draw the contract for the sale of the property, shows the following notation: "$5000 earnest money, to be in cash or approved securities."

The defendant testified that at the meeting in the office of his attorney, he stated that he was ready to make the sale of his property if Knipp was ready to pay the deposit of $5,000 that was agreed upon; that he, the defendant, asked for money or checks; that Knipp did not show any money or checks; that there was no deposit paid to him; that there "was no talk" about putting up bonds instead of cash; that he "told them if they will not pay a deposit to-night I will not be responsible that will happen to-morrow; that if no deposit was made there would be no deal; that there was no talk at any time by anybody of a deposit of $2500;" that he asked for $5000; that the day after the meeting in his attorney's office, he, the defendant, went to see his attorney and told him that Knipp was not ready to pay the deposit and that he, the defendant, and his wife had decided "to have nothing to do - there was no deal."

Clyman testified in rebuttal that at the meeting in the office of the defendant's attorney, the defendant did not say to Knipp in words or in substance; "Pay me a deposit or the deal will never go through."

We are of the opinion that there is ample evidence to sustain a finding by the jury that Knipp complied with the agreement in respect of the deposit or "earnest money."

The rule, which is a familiar one, is that the verdict of the jury will not be disturbed where the evidence is con-

said that he "was acquainted with overtitles, being in a bank, and that he (the defendant) could rely on" his "judgment to pick out the securities which should be deposited."

The memorandum made by attorney Dolan as the date from which to draw the contract for the sale of the property, shows the following notation: "Good current money, to be in cash or approved securities."

The defendant testified that, in the meeting in the office of his attorney, he stated that he was ready to sign the sale of his property if Hodge was ready to pay the amount of $8,000 that was agreed upon; that he, the defendant, asked for money or checks; that Hodge did not show any money or checks; that there was no deposit paid to him; that there "was no talk about putting up bonds instead of cash; that he "told that if they will not pay a deposit to-night I will not be responsible what will happen to-morrow; that if no deposit was made there would be no deal; that there was no talk of any time by which of a deposit of $1000;" that he asked for $1000; that the day after the meeting in his attorney's office, he, the defendant, went to see his attorney and told him that Hodge was not ready to pay the deposit and that the defendant, and his wife, had decided "to have nothing to do - there was no deal."

Dyment testified in rebuttal, in substance, that the meeting in the office of the defendant's attorney, the defendant did not say to Hodge in words or in substance: "Pay me a deposit or the deal will never go through."

As one of the grounds of the motion the Hodge contract to sustain a finding by the jury that Hodge complied with the agreement in respect of the deposit or "current money,"

The rule, which is a familiar one, is that the verdict of the jury will not be disturbed where the evidence is con-

flicting and the facts and circumstances by fair and reasonable intendment will authorize the verdict. The Illinois Central Ry. Company v. Gillis, 68 Ill. 317, 319; Bradley v. Palmer, 193 Ill. 15, 29; Carney v. Sheedy, 295 Ill., 78, 83.

Counsel for the defendant contends that the trial court committed reversible error in allowing Clyman to testify on direct examination, over the defendant's objection, that the financial worth of Knipp above his indebtedness was $75,000. The ground of counsel's contention is that Clyman had not been shown to be qualified to answer the question; and that his answer was only a conclusion. We do not think that the question and answer constitute prejudicial error in view of the fact that on the cross-examination of Clyman by the defendant's trial attorney as to how Clyman obtained his knowledge that Knipp was worth $75,000, Clyman stated that he knew Knipp was worth that amount because he, Clyman, was at a sale of a piece of property that brought Knipp $35,000 in cash; that he had seen Knipp purchase property "just previous to this" where there was $25,000 cash involved, and that he saw Knipp pay a certified check for the property; and that he knew that Knipp owned "other equities."

Counsel for the defendant further contends that on the examination of Clyman the trial court erred in denying the defendant's motion to strike out an answer of Clyman's that Knipp "owned various pieces of real estate with nominal mortgages," on the ground that Clyman admitted that he obtained his knowledge that the mortgages were nominal from what Knipp told him.

We do not think that the objection is well taken. The testimony of Clyman that is complained of was brought out by defendant's trial attorney on the cross examination of Clyman.

It is the rule that a trial attorney is not allowed to elicit testimony on cross examination, and if the testimony is

unsatisfactory have it excluded. Capen et al. v. DeSteiger Glass Company, 105 Ill., 185, 190.

Counsel for the defendant further contends that on the direct examination of Knipp by the trial attorney for the plaintiff, Knipp was allowed to testify, over the objection of the trial attorney for the defendant, that he had probably $30,000 or $40,000 in "liquid assets;" that immediately after giving this testimony Knipp testified he owned in real estate over indebtedneses and exemptions $30,000 or $40,000.

Counsel for the defendant maintains that the phrase "liquid assets" is a conclusion; and that the further testimony of Knipp in regard to the real estate he owned cannot be considered as explaining what he meant by liquid assets, as equities in real estate are slow assets.

We think that the objection of counsel for the defendant is without merit.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

unnecessary here it excluded. Cason et ux. v. Southern Pipe Company, 108 Ill., 133, 180.

Counsel for the defendant [illegible] or witness upon on the direct examination of Ruby by the trial attorney for the plaintiff, Ruby was allowed to testify, over the objection of the trial attorney for the defendant, that he had probably $30,000 or $40,000 in "liquid assets;" that he [illegible] after giving this testimony Ruby testified he owned in real estate over [illegible] mortgages and mortgages $30,000 or $35,000.

Counsel for the defendant maintains that the phrase "liquid assets" is a conclusion; and that the fact of testimony of Ruby in regard to the real estate in question cannot be considered as explaining what he meant by liquid assets, as qualifies in real estate are very erratic.

It shall be the objection of counsel for the defendant is without merit.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and [illegible], J., concur.

253 - 30106

E. C. BROWNLEE,
Appellee,

vs.

DAN ZOBEL,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

240 I.A. 676

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by E. C. Brownlee, the plaintiff, against Dan Zobel, the defendant, to recover $2000 alleged to be due to the plaintiff from the defendant for procuring a purchaser for the restaurant of the defendant.

The case was tried before a jury and the jury returned a verdict in favor of the plaintiff in the sum of $2000. The court entered judgment on the verdict and the defendant prosecuted the present appeal from the judgment.

The evidence is conflicting. By written agreement the defendant appointed the plaintiff as the exclusive agent of the defendant to sell the restaurant of the defendant. The agreement was as follows:

"Feb. 20th, 1923.

Mr. E. C. Brownlee,
25 North Dearborn Street,
Chicago, Illinois.

I, the undersigned, owner of the restaurant at 33 N. Market street, hereby appoint you as exclusive agent to sell said restaurant and equipment for me at a price of sixteen thousand dollars ($16,000). This includes all the merchandise and fixtures now located in said premises and a two year lease at $175 per month rental. It is understood that you are to have the exclusive right to sell this place for me for a period of sixty days from the above mentioned date. It is understood that

if you, I or anyone else acting for me shall sell the place during this time you are to receive a commission of $2000 to be paid at the consummation of the deal. I agree to give possession of said premises at once.

Dan Zobel."

According to the evidence on behalf of the plaintiff, during the period of the 60 days fixed by the agreement, the plaintiff advertised the property for sale in the Chicago Tribune and Chicago Daily News, two daily papers published in Chicago; that the plaintiff spent $270 on advertising the property; that the plaintiff had 800 to 1000 circulars printed and mailed to restaurant keepers and prospective purchasers; interested numerous prospective purchasers in the property; personally took ten or twelve of the prospective purchasers to view the property and introduced them to the defendant; and had many conferences with the defendant in regard to the negotiations for the sale of the property.

Evidence on behalf of the plaintiff shows further that in the first week of April, 1923, the plaintiff had a conversation with the defendant in which the defendant told the plaintiff that he, the defendant, "had been talking with a customer for the restaurant, but that the customer would not be interested in purchasing the place unless he could get a five year lease" from the owner of the premises in which the restaurant was conducted; that the customer's name was Elmer C. Cook; that the defendant told the plaintiff that as the plaintiff "handled the owner's other real estate" the plaintiff could "get the owner to work out a five year lease;" that the plaintiff succeeded in getting the lease; that on April 19, 1923, the lease was executed in the office of Harold Finder, the attorney for the owner; that a man named Cecil A. Brown, a real estate broker, who claimed to

have negotiated the sale of the restaurant to Cook for the plaintiff and who also claimed that he was present in Finder's office on April 10, 1923, when the lease was executed, was not present in Finder's office on that occasion; that when Finder's attention was called to Brown on the trial Finder testified that he was quite sure he had never met Brown at any time and that he did not know him; that when the lease was executed there were present in Finder's office, Finder, Cook, the plaintiff and the defendant; that after the lease was executed it was handed to Cook and that Cook gave a check to the defendant for $16,000; that the defendant gave Cook a bill of sale or an instrument transferring the restaurant; that the plaintiff said to the defendant, "What about the commission?" that the defendant replied, "Try and get it, try to collect. Go sell it again;" that the plaintiff said, "How can you do that if you made a lease with Cook and you have got the money?" that the defendant said, "Never mind that, go sell it again;" that before the transaction with Cook the plaintiff had told the defendant that he had two prospective purchasers for the restaurant named Fozell and Kenouchi, who would pay $6000; that the defendant said, "Well, what is the difference if Cook takes it or Fozell takes it, as long as I get the money?"

The evidence on behalf of the defendant shows that the defendant did not see the plaintiff for thirty-five or thirty-six days after the defendant signed the agreement giving the plaintiff the exclusive agency to sell the restaurant; that the defendant did not go to see the plaintiff because the defendant was not in a hurry to sell the restaurant; that the defendant might have gone to see the plaintiff seven or eight times between February 20, 1923, and April 20, 1923; that the defendant read the Chicago Tribune and the Chicago Daily News and did not see any advertisements for the sale

have negotiated the sale of the instruments to Jack for the plaintiff and who also claimed that he was seen in Tinder's office on April 10, 1923, when the lease was executed, was not present in Tinder's office on that occasion; that when Tinder's attention was called to Brown on the trial Tinder testified that he was quite sure he had never met Brown at any time and that he did not know him; that when the lease was executed [illegible] in Tinder's office, Tinder, Cook, [illegible] the instrument; that after the lease was [illegible] Cook gave a [illegible] for the defendant for $10; [illegible] gave Cook a bill of sale on [illegible] instruments; that the [illegible] said to the [illegible], "Have you the commissions" that the defendant replied, "[illegible] it. [illegible] collect. Do call it an [illegible]" when the [illegible] said, "[illegible] you do that if you made [illegible] on the [illegible]" that the defendant said, "[illegible]" and before the [illegible] left, [illegible] "[illegible] Tandout [illegible] named Brown [illegible], the [illegible] said, "Well, what is the [illegible] taken it, so [illegible] I put [illegible]?"

The [illegible] defendant did not see the [illegible] days after the [illegible] machinery owned to sell [illegible] to see the [illegible] sell the machinery; that the [illegible] plaintiff were on night times [illegible] 20, 1923; that the [illegible] Chicago Daily News [illegible]

of the restaurants in those papers; that the plaintiff did not tell the defendant that he had purchasers for the restaurant named Pozell and Renouchi; that about April 5, 1923, the defendant told the plaintiff he, the defendant, had a purchaser named Rothschild, who would give $7,500; that the plaintiff said, "Grab hold of it Zobel, it is as much as you can ever get for the place. I can't get you $16,000 for that place with a two year lease;" that the defendant said that he would get a five year lease; that Rothschild signed a lease for five years in the presence of the plaintiff; that the plaintiff said that he would take the lease to the landlord and have him sign it; that the plaintiff telephoned that he couldn't get the lease; that the defendant finally sold the restaurant to Cook for $7,000; that Brown of the firm of Brown & Hammer represented the defendant; that the defendant gave Brown $500 and gave Benjamin J. Morris $1000 for the owner of the property to get him to sign the lease; that Cook gave Brown and Hammer a check for $8,500, and that Brown and Hammer gave the defendant a check; that the transaction took place in the office of Brown and Hammer; that on April 10, 1923, Brown, Hammer. Cook, and the defendant were in the office of Finder when the five year lease to Cook was executed; that the plaintiff was in an anteroom or in the hall; that Cook never saw the plaintiff until he saw him in court on the trial of the present case; that no check was passed to Cook from the defendant in Finder's office; that Brown knew that the plaintiff had the exclusive agency to sell the restaurant; that the defendant had nothing to do with the purchase of the restaurant by Cook; that when Cook gave the defendant the money for the restaurant the defendant told Cook that the plaintiff had an exclusive agency to sell the restaurant and that the plaintiff had a claim for $2000 for commissions. The evidence on behalf of the defendant showed further that when the restaurant was sold to Cook

of the contumacia in these courts; that the plaintiff did not [illegible] the defendant had acted in a manner [illegible] the [illegible] and Bannockbi; that about April 8, 1918, the defendant [illegible] [illegible] tiff he, the defendant, had a murderer named [illegible], who would give $7,500; that the plaintiff said, "[illegible] or it shall, [illegible] as much as you can over yet for the place. I would get you [illegible] for that place with a two year lease; [illegible] he would get a five year lease, that [illegible] five years in the presence of the [illegible] said they he would take the [illegible] it; that the plaintiff [illegible] the lease; that the defendant [illegible] the [illegible]; that Brown [illegible] that the defendant was [illegible] for the owner of the property to [illegible] gave Brown and Hamner a [illegible] gave the defendant a check; that the transaction [illegible] office of Brown and Hamner; [illegible] Hamner. Clark, and the [illegible] in [illegible] your lease to Hamner was [illegible] room or in the hall; that Clark never [illegible] him in court on the trial of the [illegible]; that [illegible] passed to Clark from the [illegible] know that the plaintiff had [illegible] rent; that the defendant [illegible] the [illegible] rent by [illegible]; that [illegible] the [illegible] a claim for [illegible] defendant showed [illegible] [illegible]

on April 10, 1923, the defendant told Cook that "it would be advisable not to take possession until after the expiration of the exclusive agreement;" and that that was the reason that Cook did not take possession on April 10, 1923, when he got his bill of sale and lease.

We do not deem it necessary to point out specifically the many material conflicts in the evidence we have set out above. The conflicts are obvious. There is, however, ample evidence to sustain the verdict of the jury. In this state of the record, according to the familiar rule, the verdict of the jury should not be disturbed. In the case of The Illinois Central Ry. Co. v. Gillis, 68 Ill., 317, the court said (p.319): "If any rule of this court can be so well established as to be neither questioned nor require the citation of authorities to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances by fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony." To the same effect are the following cases: Bradley v. Palmer, 193 Ill., 15, 89; Carney v. Sheady, 295 Ill., 78, 83; Blackhurst v. James, 304 Ill., 586, 592. In the case of People v. Boucher, 303 Ill., 375, the court explicitly stated (pp. 380, 381): "It is the most important function of the jury and their peculiar province to determine the truth of the case, and the opportunity which they have of seeing and hearing the witnesses during their examination and cross-examination is clearly superior to that of a court of review which has before it only a record of the words used by the witnesses."

It will be observed from the evidence which we have set out above, that the restaurant was sold to Cook by the defendant before the expiration of the time within which the plain-

tiff had the exclusive agency to sell the restaurant. It is true that by agreement between Cook and the plaintiff the possession of the restaurant was not given to Cook until after the expiration of the time within which the plaintiff had the exclusive agency to sell the restaurant. In our opinion this was merely a subterfuge on the part of the defendant to evade the payment of a commission to the plaintiff. As was said in the case of Holly Springs Savings and Insurance Company v. Board of Supervisors of Marshall County, 52 Miss., 281, 288, 289, "courts will look through the sham and measure the rights of the parties by the real nature of the transaction."

Counsel for the defendant contend that on "a fair, full and complete interpretation" of the agreement giving the plaintiff the exclusive agency for 60 days to sell the restaurant, the defendant "was not prohibited himself from making a sale of the property and that in the event he made such sale to anyone not produced by the plaintiff he would not be liable to him for commissions." The defendant may not have been precluded from selling the restaurant within the sixty days, but if he did sell it during that time, by the terms of the agreement he was under a legal obligation to pay the plaintiff the commission stipulated in the agreement, provided the plaintiff had not abandoned the contract; Hanlon v. Dunne, 189 Ill. App., 123, 125; and we do not think that the evidence shows that the plaintiff had abandoned the contract.

Counsel for the defendant further contends that the contract was unilateral and therefore not enforceable.

The answer to this contention is that the evidence shows that the contract was performed. The rule is well settled that a promise lacking in mutuality in its inception becomes binding

tiff has the exclusive agency to sell the restaurant. It is true that by agreement [illegible] the commission of the restaurant was not given to them until after the expiration of the time within which the plaintiff had the exclusive agency to sell the restaurant. In our opinion it was merely a subterfuge [illegible] to evade the payment of a commission to the plaintiff. [illegible] Sanders [illegible] Marshall County, 93 [illegible] through the sham and [illegible] the real nature of the transaction."

[illegible]

Full and complete [illegible] plaintiff [illegible] ment, [illegible] sale of the property [illegible] anyone [illegible] him for [illegible] from selling [illegible] sell it [illegible] under [illegible] stipulated [illegible] dence [illegible] and [illegible] had [illegible].

[illegible] contract was [illegible].

[illegible] shows [illegible] that a [illegible]

ing on the promisor after performance by the promisee. Plumb v. Campbell, 129 Ill., 101, 107; Hanlon v. Dunne, 189 Ill. App., 123, 125.

The judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

law on the precedent after partial use by the predecessor. Long v. Campbell, 124 Ill., 141, 147; Illinois v. Delaney, 154 Ill., 401, 405, 135.

The judgment of the trial court is affirmed.

AFFIRMED.

Mashbeck, P. J., and Lindsay, J., concur.

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THE CHICAGO SMELTING & REFINING CORPORATION, a Corporation,
Appellee,

vs.

THOMAS H. SULLIVAN, Doing Business as United Electric Service Company,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

240 I.A. 677

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought in the Municipal court of Chicago by The Chicago Smelting & Refining Corporation, the plaintiff, against Thomas H. Sullivan, doing business as the United Electric Service Company, the defendant, to recover the sum of $1457.10 alleged to be due to the plaintiff for certain pig lead sold by the plaintiff to the defendant. Judgment was entered in favor of the plaintiff for the sum of $1457.10 and costs. From the judgment the defendant has prosecuted the present appeal.

To the plaintiff's statement of claim the defendant filed an affidavit of merits and a set-off. Subsequently the plaintiff filed an amended statement of claim, alleging the same facts as were alleged in the original statement of claim, with the additional allegation that the plaintiff, "The Chicago Smelting and Refining Corporation, a corporation, was incorporated under the laws of the State of Illinois on November 21, 1923." To the amended statement of claim the defendant filed an affidavit of merits containing the same allegations as in the original affidavit of merits. The plaintiff made a motion to strike from the files the defendant's affidavit of merits to the amended statement of claim; and also moved to strike from the files the defendant's set-off which had been filed to the original statement of claim. The court sustained both of the motions of the plaintiff and gave

THE CHICAGO MOTORS & MANUFACTURING CORPORATION, a Corporation,
Appellant,

vs.

THOMAS R. MCCLEAN, John Doe and as United Electric Service Company,
Appellees.

Mr. Justice Johnston delivered the opinion of the court.

This is an action brought in the Municipal Court of Chicago by the Chicago Motors & Manufacturing Corporation, the plaintiff, against Thomas R. McClean, John Doe and the United Electric Service Company, the defendants, in trover, to recover the value of $1487.10 alleged to have been converted by the defendants. Judgment was rendered by the plaintiff [illegible] in favor of the plaintiff for the sum of $1477.10 and costs. From the judgment the defendant has appealed to this court.

[illegible] of the Municipal Court of Chicago filed an affidavit of merits and a replevin bond. [illegible] affidavit filed on behalf of the defendants, alleging the same facts as were alleged in the affidavit of merits, with an additional allegation that [illegible], the plaintiff has not [illegible] Definition Corporation, [illegible] the laws of the [illegible] Illinois. In a sworn affidavit of merits [illegible] affidavit of merits [illegible] affidavit of title. [illegible] Title the defendants's affidavit of merits [illegible] of claim; and also moved to strike [illegible] motion to strike [illegible] The court sustained both of the motions [illegible]

the defendant leave to file another affidavit of merits. The defendant also asked leave to file an amended set-off. The court denied the motion. The defendant then filed another affidavit of merits.

The court struck this amended affidavit from the files. The defendant then moved for leave to file another amended affidavit of merits. The court denied the motion and entered judgment against the defendant as of default, assessing the damages at the sum of $1457.10.

In the view we take of the case the only question is whether the court erred in refusing to allow the defendant to file an amended set-off.

The defendant is not entitled to have the question of the sufficiency of his third affidavit of merits reviewed, for the reason that he waived that right by making a motion to file another amended affidavit of merits. The record shows that the defendant filed three affidavits of merits, all of which were stricken from the files. The defendant made a motion to file a fourth affidavit of merits, which motion was denied. In our opinion it was this motion which constituted a waiver of the defendant's right to have the sufficiency of his third affidavit of merits reviewed. The rule, as stated in the case of Harris et al. v. Willis, 209 Ill. App. 402, 402, is that "A defendant whose affidavit of merits and statement of set-off have been stricken waives any right of having the court's ruling reviewed on appeal where he thereafter asks leave to file an amended affidavit and statement." On principle the question of abandonment depends on the question of intent; and intent may be manifested as well by a motion for leave to plead over as by an actual pleading over. If the defendant had desired to test the sufficiency of the third affidavit of merits, he should have stood

the defendant leave to file such an affidavit of merits. The defendants also asked leave to file a counter-claim. The court denied the motion. The defendant then filed such an affidavit of merits.

The court ordered this amount of costs upon the filing. The defendant then moved for leave to file another and an affidavit of merits. The court granted the motion and entered judgment against the defendant as of default, amounting to the sum of $1427.10.

In this case we have an interesting question in whether the court erred in refusing to allow the defendant to file an amended affidavit.

The federal [illegible] the sufficiency of the filed affidavit of merits rests, the reason that is waived [illegible] to file an amended affidavit of merits. The [illegible] filed three affidavits of merits. [illegible] the filing of merits, [illegible] tion which [illegible] sufficiency of the first affidavit [illegible] stated in the case of Harris [illegible] 402, in that "a defendant who [illegible] self-off have been [illegible] trying [illegible] amended affidavit and [illegible] abandonment depends on the [illegible] manifested as well by a motion [illegible] actual pleading over. If the defendant [illegible] sufficiency of the first affidavit [illegible]

by the affidavit. Stuber v. Schack, 83 Ill., 191; McKichan v. Follett, 87 Ill., 103, 104.

We do not think that the refusal of the court to allow the defendant to file a fourth affidavit of merits can be said to be an abuse of discretion. Harris et al. v. Willis, supra, (p. 403). We have examined the affidavit of merits, however, and we do not think that it presented a sufficient defense. There is no allegation that the defendant rejected the pig lead, and there is no allegation that the defendant ever offered to return the pig lead to the plaintiff.

Counsel for the defendant state that the "defendant did not know and could not know as to whether or not the merchandise was proper; and he only discovered the imperfections of the material when his customers complained and refused to pay for the merchandise he sold them."

The answer to the contention of counsel for the defendant is that there is no allegation that after the defendant made such discovery the defendant notified the plaintiff and offered to return the pig lead. The law is that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after a lapse of reasonable time, he retains the goods without intimating to the seller that he has rejected them. Sales Act, section 48, chap. 121a.

The second amended set-off which the court refused leave to the defendant to file, is as follows:

"That on or about, to-wit: July, 1923, he became and was the legal holder and owner of a note for the sum of $2,000.00, signed by the Chicago Smelting & Refining Co., by L. C. Robinson; that thereafter, on or about the 21st day of September, 1923, the

by the affidavit. Wagner v. Gorman, 83 Ill., 148; Hawkins v. Hoffman, 97 Ill., 544, 554.

We do not think that the rulings of the court in allow the defendant to file a further affidavit of merits can be said to be an abuse of discretion. McCrea v. Willis, supra, (p. 402). We have examined the affidavits of merits, however, and we do not think that it presented a sufficient defense. There is no allegation that the defendant relied on the slip card, and there is no allegation that the defendant ever offered to return the pig lead to the plaintiff.

Counsel for the defendant cite [illegible] that "defendant did not know and could not know as to [illegible] or not the warehouse was proper; and he only discovered the deficiencies of the material when the unknown company [illegible] by the warehouse he said them."

The answer to the contention is [illegible] for the defendant is that there is no allegation that after the defendant made such discovery the defendant notified the plaintiff and offered to return the pig lead. The law is that the bailee is deemed to have received the goods when he learned of the bailee's act he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the bailor, or when, after a lapse of reasonable time, he retains the goods without [illegible] to the bailor that he has rejected them. Spine v. Hutson, supra, p. [illegible].

The account [illegible] which the court refers leaves in the letter set in full, is as follows:

"Just as we stand, [illegible], 1909, he [illegible] was the legal holder and owner of a note [illegible] signed by the Illinois Smelting & Refining Co., [illegible]; that thereafter, on or about the [illegible] of [illegible], 1909, the

Chicago Smelting & Refining Co. paid the sum of $500.00 on account of said note, and issued three new notes each for the sum of $500.00 dated September 21, 1923, and payable to the order of Arthur Storage Battery Supply Co.; that the defendant herein became the legal holder and owner of the said three notes, and that he delivered up to the Chicago Smelting & Refining Co. the said note for the sum of $2,000.00; that the said three notes became due in thirty, sixty and ninety days after date, that they were signed by the Chicago Smelting & Refining Co. by L. C. Robinson, and that the said notes were endorsed in blank by the said Arthur Battery Supply Co., and also by one H. L. Robinson, and negotiated and delivered to the defendant herein for a valuable consideration, and that the said Thomas H. Sullivan is now the legal holder and owner of the said three notes, said notes being more fully described as follows: (the notes are set out); that at the time of the execution of the said notes, the said L. C. Robinson was engaged in business with and as the partner of one H. Feinberg, doing business as Chicago Smelting & Refining Company; that thereafter, to-wit: November 21, 1923, said partnership business was incorporated under the name of Chicago Smelting & Refining Corporation, the plaintiff herein, and the said Chicago Smelting & Refining Corporation assumed to pay the obligations of the said business as conducted prior to the incorporation; that the said notes were presented for payment on the dates they became due, and that the Chicago Smelting & Refining Corporation has failed and refused to pay same; that the said notes bear interest at 6% per annum, and that principal and interest now owing amount to $1560.00."

Counsel for the plaintiff contends that the general rule is that where a partnership is incorporated, the corporation does not become liable for the indebtedness of the partnership unless the corporation has expressly assumed such indebtedness;

Chicago Smelting & Refining Co. paid the sum of $[illegible] on account of said note, and issued three new notes each for the sum of $500.00, dated September 21, 1923, and payable to the order of Arthur Storage Battery Supply Co.; that the defendant herein became the legal holder and owner of the said three notes, and that he delivered up to the Chicago Smelting & Refining Co. the said note for the sum of $2,000.00; that the said three notes became due in security, risky and utterly desperate state, that they were signed by the Chicago Smelting & Refining Co. by L. G. Robinson, and that the said notes were endorsed in blank by the said Arthur Battery Supply Co., and also by one A. J. Robinson, and negotiated and delivered to the defendant herein for a valuable consideration, and that the said Thomas B. Quillivan is now the legal holder and owner of the said three notes, said notes being more fully described as follows: (the notes are set out); that at the time of the execution of the said notes, to wit L. G. Robinson was engaged in business with and as the partner of one H. Weinberg, doing business as Chicago Smelting & Refining Company; that thereafter, to-wit: November 21, 1923, said partnership business was incorporated under the name of Chicago Smelting & Refining Corporation, the plaintiff herein, and the said Chicago Smelting & Refining Corporation assumed to pay the obligations of the said business as conducted prior to the incorporation; that the said notes were presented for payment on the dates they became due, and that the Chicago Smelting & Refining Corporation has failed and refused to pay same; that the said notes now draw interest at [illegible] annum, and that principal and interest now owing amount to $[illegible]."

Counsel for the plaintiff contends that the general rule is that where a partnership is incorporated, the corporation does not become liable for the indebtedness of the partnership unless the corporation has expressly assumed such indebtedness;

and that the allegations in the set-off in the case at bar are not sufficient to show that the indebtedness of the partnership was assumed by the plaintiff.

The general rule may be correctly stated by counsel for the plaintiff, but we are of the opinion that the assumption by the plaintiff of the liability of the notes in question was sufficiently alleged in the set-off by the averment that the plaintiff "assumed to pay the obligations of said business as conducted prior to the incorporation."

Counsel for the plaintiff maintains that this allegation "is a mere conclusion and is meaningless." The allegation is a conclusion, but we think that it is a conclusion of an ultimate fact, and that it constitutes proper pleading. We recognize, of course, the general rule of pleading that conclusions of fact, and not conclusions of law, should be pleaded. The distinction between conclusions of fact and conclusions of law is difficult to draw. The difficulty has been well expressed in the case of Clark v. Chicago, Milwaukee and St. Paul Ry. Company, 28 Minn. 69, in which the court said (pp. 71, 72): "It may not be possible to formulate a definition that will always describe what is a mere conclusion of law, so as to distinguish it from a pleadable ultimate fact, or that will define how great an infusion of conclusions of law will be allowed to enter into the composition of a pleadable fact. Precedent and analogy are our only guides. And it is undoubtedly true that there will be found a want of entire judicial harmony in the adjudicated cases as to what are statements of fact, and what are mere conclusions of law. And in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle."

and that the allegations in the cut-off in the case at bar are not sufficient to show that the interference was proximately was caused by the plaintiff.

The general rule may be correctly stated by counsel for the plaintiff, but in one of the citation it is the assertion by the plaintiff of the liability of the rotos in question was sufficiently alleged in the cut-off by the statement that the plaintiff "assumes to pay the obligations of said vendors as enumerated prior to the incorporation."

Counsel for the plaintiff maintains that this allegation "is a mere conclusion and is meaningless." The allegation is a conclusion, but we think that it is a conclusion of an ultimate fact, and that it sufficiently proper pleading. By rendering, of course, the general rule of pleading that conclusions of fact and conclusions of law, should be pleaded. The distinction between conclusions of fact and conclusions of law is difficult to draw. The difficulty has been well expressed in the case of Lundy v. Chicago, Milwaukee and St. Paul Ry. Lundy, 3 Wisc. 65, in which the court said (p. 71): "It may not be possible to formulate a definition that will always distinguish what is a mere conclusion of law, so as to distinguish it from a conclusion of fact, or that will point out where the dividing line of conclusions of law will be allowed to enter into the composition of a pleading fact. Precedent and analogy are our only guides. And it is undoubtedly true that there will be found a most intricate judicial harmony in the adjudicated cases as to what are statements of fact, and what are mere conclusions of law. And in drawing one close of interference as there is to be pleaded, and conclusions of law to be avoided, courts may have been driven wrong by precedent than by a substantial difference in principle."

Ultimate facts are conclusions of facts. Brown v. City of Aurora, 109 Ill., 165, 167; Roemheld v. City of Chicago, 231 Ill. 467. To reach an ultimate fact or a conclusion of fact it may be necessary to apply legal principles and thus make the conclusion a mixed one of law and fact. Roemheld v. City of Chicago, supra. (p. 470.) But it is permissible to plead a conclusion that is a mixed one of law and fact. This must necessarily be so, as otherwise pleadings would be mere statements of evidentiary facts, and would become intolerably prolix. Clark v. Chicago, Milwaukee & St. Paul Ry. Company, supra (p. 71). The law is well settled that ultimate facts may be pleaded. 21 Ruling Case Law, 438; Chicago, Milwaukee & St. Paul Ry. Company, supra, (p. 71).

In the case of Harding v. Parshall, 56 Ill., 219, it was held (p. 226) that it is sufficient to allege that a party to a contract executed the contract and that it was not necessary to aver the manner of the execution of the contract; and it was also held (p. 226) that an allegation that a party to a contract ratified the contract was sufficient.

In the case of Matthiessen v. Duntley, 307 Ill., 36, it was held (pp. 39, 40) that an allegation that there was no consideration for a contract was sufficient.

Counsel for the plaintiff further contends that the defendant abandoned the second amended set-off by filing another set-off; and that the latter set-off is wholly insufficient.

We do not think that the contention is sound. After the court refused the defendant leave to file the second amended set-off the defendant did not file another separate set-off; but when by leave of court he filed his third amended affidavit of merits, he included in the amended affidavit of merits the following allegations:

[illegible] facts are [illegible] of facts. [illegible] v. City of Aurora, 106 Ill., [illegible], 1877; [illegible] v. [illegible] [illegible], [illegible] 457. To reach an ultimate fact or conclusion of fact it may be necessary to apply legal principles and [illegible] a mixed one of law and fact. [illegible] v. [illegible] (p. 470.) But it is [illegible] a mixed one of law and fact. This must necessarily be so, otherwise pleadings would be [illegible], and would become intolerably prolix. [illegible] v. Chicago, Milwaukee & St. Paul Ry. Company, supra (p. 73). [illegible] ultimate facts may be pleaded. [illegible] Milwaukee & St. Paul Ry. Company, supra, (p. 73)

In the case of [illegible] v. [illegible], [illegible] Ill., [illegible], it was held (p. [illegible]) that it is sufficient [illegible] to a contract [illegible] over the manner of the [illegible]; [illegible] held (p. [illegible]) that an allegation [illegible] filed the contract [illegible].

In the case of [illegible] v. [illegible], [illegible] it was held (p. [illegible]), that [illegible] consideration [illegible] nideration [illegible].

[illegible] defendant [illegible] set-off; [illegible]

We do not think that [illegible] the court [illegible] set-off the defendant [illegible] when by reason of [illegible] moving [illegible] improvement.

"Defendant further states that he has a set-off and claim against the plaintiff for three notes dated September 21, 1923, each for the sum of $500.00, and due in thirty, sixty and ninety days after date, which notes were signed by the Chicago Smelting & Refining Company, by L. C. Robinson; that the plaintiff is indebted to this defendant on said notes in a total sum of $1,560.00, and that this defendant is not only not indebted to plaintiff, but that plaintiff is indebted to this defendant in the sum of $1,560.00."

The defendant had no right to file another set-off as the court had previously refused to allow him to file the second amended set-off; and the defendant did not renew his motion to file a third amended set-off. If the allegations which we have quoted above from the third amended affidavit of merits should be construed as constituting a set-off, then the defendant filed the set-off without presenting it to the court as a set-off, and without asking leave of the court to file it as a set-off. The alleged set-off, as we have stated, was contained in the third amended affidavit of merits; and the order of the court was to strike the third amended affidavit of merits from the files. The order made no reference whatever to a set-off. In this state of the record the allegations contained in the third amended affidavit of merits properly could not be treated as a set-off. As there was no order of the court to strike the alleged set-off from the files, no error could be assigned by the defendant on the ground that he had filed a third amended set-off, which the court had stricken from the files. Since the record is in such condition that the defendant is not in a position consistently to term the allegations contained in the third amended affidavit of merits a set-off, the defendant cannot be charged with having abandoned the second amended set-off which he asked leave to file, and which the court refused to allow him

"Defendant further alleges that it has a set-off and claim against the plaintiff for three notes dated December 1, 1923, each for the sum of $500.00, [illegible] in thirty, sixty and ninety days after date, which notes were signed by the Illinois Smelting & Refining Company, by [illegible], President; that the plaintiff is indebted to this defendant on said notes in a total sum of $1,500.00, and that this defendant is not indebted to plaintiff, but that plaintiff is indebted to defendant in the sum of $1,500.00."

The defendant made [illegible] motion for an order requiring the court had previously ruled [illegible] to file a separate set-off; and the defendant [illegible] to file a third separate set-off. If the [illegible] above from the third separate affidavit of merits [illegible] an constituting a set-off, [illegible] without prejudice, [illegible] leave of the court to file it [illegible]. [illegible] as we have stated, [illegible] merits; and the order of [illegible] affidavit of merits from the [illegible] whatever to a set-off. [illegible] contained in the [illegible] not be treated as a [illegible] strike the filed set-off [illegible] signed by the [illegible] separate set-off, [illegible] Since the [illegible] a positive [illegible] the third separate set-off [illegible] be [illegible] to file, [illegible]

to file.

We do not wish to be understood as deciding the question whether under the rules of pleading in the Municipal court, a set-off should be pleaded in a separate plea and designated as a set-off; or whether a set-off is sufficiently pleaded, if, in the affidavit of merits, facts are alleged which properly constitute a set-off. We are merely holding that on the present record it cannot be contended that the language in the affidavit of merits constitutes a set-off.

Since we have held that the court correctly denied the motion of the defendant to file a fourth amended affidavit of merits, the only issue in the case that remains to be determined on a new trial will arise on the defendant's second amended plea of set-off. If the defendant fails in its proof of set-off, judgment must be entered for the plaintiff's claim, as, according to the rule "the plea of set-off is an acknowledgment of the justice of the plaintiff's demand." Raymond et al. v. Kerker, 81 Ill., 381, 382; Smith v. Bellrose, 200 Ill. App., 368, 372.

It follows from the views we have expressed that the judgment of the trial court should be reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

to life.

We do not view [illegible] as [illegible] the question whether under the rules of pleading in the [illegible], a set-off should be pleaded in a separate plea and [illegible] a set-off; or whether a set-off is a [illegible], i.e., in the affirmative of pleas, [illegible] [illegible] such a set-off. We are merely saying that on the present record it cannot be contended that the [illegible] [illegible] merits constitutes a set-off.

Since we have [illegible] [illegible] [illegible] the motion of the defendant to file a [illegible] [illegible] merits, the only issue in the case [illegible] [illegible] on a new trial will rest on the [illegible] [illegible] set-off. If the [illegible] [illegible] in the [illegible] of set-off, [illegible] must be entered for the plaintiff's claim, [illegible] "the plea of set-off is [illegible] [illegible] plaintiff's [illegible]." [illegible] v. [illegible], [illegible], 1907; [illegible] v. [illegible], [illegible], 36, 37.

It follows that the views [illegible] [illegible] judgment of the trial court should be reversed [illegible] remanded.

[illegible].

Matthews, P. J., and [illegible], J., [illegible].

293 - 30146

ANGLO-CALIFORNIA TRUST COMPANY,
a corporation,
Appellant,

v.

ESSANAY FILM MANUFACTURING COMPANY,
a corporation,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

240 I.A. 677

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the Anglo-California Trust Company, a corporation, the plaintiff, against the Essanay Film Manufacturing Company, a corporation, the defendant on a contract entered into by the Essanay Film Manufacturing Company and G. M. Anderson, at one time a stockholder in the Essanay Film Manufacturing Company, in which contract the Anglo-California Trust Company acquired rights by virtue of an assignment from Anderson.

The contract is as follows:

"On May 27th, 1919, pursuant to a discussion between ourselves relative to the Chaplin pictures owned by the Essanay Film Mfg. Company (52 per cent) and yourself (48 per cent) you made the Essanay Company the proposition for the purchase of your 48 per cent interest in said Chaplin pictures, viz:

For the sum 1 - $25,000 Cash
2 - 25,000 Note with Int. 5%, 6 months from May 27, 1919.
3 - 25,000 to be paid May 27, 1920.
4 - 25,000 to be paid Nov. 27, 1920.
5 - 25,000 to be paid May 27, 1921.
6 - 25,000 to be paid Nov. 27, 1921.

A total of $150,000 for which you sell, to the Essanay Film Manufacturing Company all right title and interest in said Chaplin pictures represented by the 48 per cent held by you. It is understood and agreed between yourself and Essanay Film Manufacturing Company that Item No. 1 - $25,000 cash be paid to you. (Item No. 2-$25,000 note with int. 5% be given you with this memorandum. The further items Nos. 3-4-5-6 representing $25,000 each are to be paid you at intervals of six months as herein dated provided the sums when due have been earned by said pictures, and at the option of Essanay Film Mfg. Co. - that is to say, that if at any period upon which any unpaid item of $25,000 is due you, should the Essanay Company desire to return to the

ANGLO-DANUBIAN FILM SYNDICATE, a corporation, appellant,	
v.	
MERANAY FILM MANUFACTURING COMPANY, a corporation, appellee.	

MR. JUSTICE TOMLINSON DELIVERED THE OPINION OF THE COURT.

This is an action brought by the Anglo-California Trust Company, a corporation, the guaranty, against the Meranay Film Manufacturing Company, a corporation, the defendant on a contract entered into by the Meranay Film Manufacturing Company and C. E. Anderson, at one time a stockholder in the Meranay Film Manufacturing Company, in which contract the Anglo-California Trust Company acquired rights by virtue of an assignment from Anderson.

The contract is as follows:

"On July 25th, 1921, Meranay is to a commission between authority relative to the Chinese pictures and for the Meranay Film MFg. Company (85 per cent) and personally (15 per cent) can only the Meranay Company the exclusive to the purchase of 5 or 25 per cent interest in and Chinese pictures, viz:

For the sum of - 15,000 cash
" - 25,000 Note with in 1 yr., 6 months from July 27, 1921.
" - 25,000 to be paid Jan 27, 1922.
" - 25,000 to be paid Jan. 27, 1923.
" - 25,000 to be paid Jan 27, 1924.
" - 25,000 to be paid Jan. 27, 1925.

A total of $120,000 [illegible] Film Manufacturing Company will right [illegible] said Chinese pictures represented by the [illegible] by you. It is understood and agreed between personally Meranay Film Manufacturing Company [illegible] cash be paid to you. (Also [illegible] be given you with this [illegible] 3-4-5-6 representing $30,000 [illegible] intervals of six months [illegible] when due have been signed by each [illegible] option of Meranay Film MFg. Co. - that is to say, that if as any period upon which any unpaid item of $15,000 is due you, when [illegible] Company decide to return to the

52-48% basis in lieu of specific payment to you of any of the unpaid items Nos. 3-4-5-6 it shall have full privilege of so doing and thereafter the basis of 52% to Essanay and 48% to you shall prevail. Also between you and the Essanay Film Mfg. Company that this arrangement for the purchase of these Chaplin pictures includes everything represented by your 48% interest in said property, excepting a 48% interest in recovery or loss together with cost and expense in the prosecution and defense of any and all suits at law now existing and of date of May 27th or previous thereto in the Federal or State Courts between Charles Chaplin and Essanay Film Mfg. Company. The $25,000 cash item No. 1 - has been paid to you, and the note for $25,000 item No. 2 - is herewith enclosed. This memorandum is enclosed to you in duplicate. Please sign as accepted in the space indicated below and return original copy by immediate mail. It is agreed that May 27, 1919, is the date of this transaction.

Yours truly,

(Signed) Essanay Film Mfg. Co.,
By Geo. K. Spoor, Pres.

Accepted May 27, 1919,
(Signed) Essanay Film Mfg. Co.,
By Geo. K. Spoor, Pres.

Accepted May 27, 1919,
(Signed) G. M. Anderson."

The plaintiff claims that under the contract there is due and owing to the plaintiff the sum of $25,000.

The defendant filed the plea of general issue and a plea of set-off. In the plea of set-off the defendant alleged that the defendant had expended in the prosecution and defense of the litigation between the defendant and Charles Chaplin the sum of $47,881.29; and that by the terms of the contract Anderson, the assignor of the plaintiff, owed the plaintiff 48% of that amount, namely, $22,973. Attached to the plea of set-off is an itemized statement of the expenditures alleged to have been made by the defendant in the prosecution and defense of the litigation.

The case was tried before a jury. On the trial the defendant admitted the claim of the plaintiff and relied only on the plea of set-off. The jury returned a verdict in favor of the plaintiff in the sum of $3,581.87. In other words, the jury allowed the defendant a set-off amounting to $21,418.13. The court entered judgment on the verdict. From the judgment the

[illegible] basis in lieu of specific payment to you of any of the unpaid items due. [illegible] pay[illegible] privileges of re-entry and thereafter the [illegible] to assumpsit and [illegible] to you shall [illegible]. [illegible] between you and the Factory File Mfg. Company is a [illegible] for the purchase of these simple pictures includes [illegible] thing improvement by your [illegible] interest in said property, exceeding a [illegible] interest in your or in Love Company [illegible] cost and expense in the [illegible] all suits or [illegible] and of [illegible] or [illegible] provision therein in the amount of [illegible] between Charles Chaplin and Factory File Mfg. Company. The [illegible] each item [illegible] - [illegible] paid to you, and the [illegible] $[illegible] [illegible] $[illegible] - [illegible] herewith enclosed. This memorandum is enclosed to you in duplicate. Please sign [illegible] in the space indicated below and return original [illegible] by immediate mail. It is agreed in [illegible] May [illegible], [illegible] the date of this transaction.

Yours truly,

(signed) Factory File Mfg. Co.,
By [illegible]

Accepted May 27, [illegible]
(signed) Factory File Mfg. Co.,
By [illegible]

Accepted May [illegible], [illegible]
(signed) [illegible] R. [illegible]."

The plaintiff claims that under the contract [illegible] is due and owing to the plaintiff the sum of [illegible].

The defendant filed the plea of general issue and a plea of set-off. In the plea of set-off the defendant claims that the defendant [illegible] in the [illegible] of the litigation between the [illegible] and Charles Chaplin the sum of $47,881.00; and that by the terms of the contract [illegible] the assignee of the plaintiff, and the plaintiff [illegible] namely, May, 1918. It does to the plea of set-off in a [illegible] statement of the counterclaim claimed [illegible] the defendant in the prosecution and defense of the litigation.

The case was tried before [illegible]. The trial [illegible] defendant rested the claim of the plaintiff [illegible] the plea of set-off. The jury rendered a [illegible] plaintiff in the sum of $[illegible]. [illegible] allowed the defendant a set-off amounting to $[illegible]. The court entered judgment [illegible] the verdict. [illegible] the

plaintiff has prosecuted this appeal.

The grounds on which counsel for the plaintiff ask for a reversal of the judgment relate mainly to the evidence.

The defendant corporation was engaged in the business of producing moving pictures. Spoor was president of the corporation and owned 52% of the stock. Anderson was a stockholder and owned 48% of the stock. In the year 1916 Anderson sold his stock to Spoor and ceased to be a stockholder in the defendant corporation. Anderson had a joint interest with the defendant in certain pictures which had been produced by the defendant for Charles Chaplin, and which were known as the Chaplin pictures, Anderson's interest in the pictures being 48% and the interest of the defendant being 52%. It was in regard to Anderson's interest in the Chaplin pictures that the contract in question between the defendant and Anderson was entered into. Before the making of this contract litigation had arisen between Chaplin and the defendant concerning the Chaplin pictures. One of the pictures called "Carmen," which was originally made for two reels, was lengthened by the defendant to a four reel picture, and was sent to the distributing office of the defendant for sale and distribution. Chaplin brought suit against the defendant in New York City for damages to his reputation in the amount of $100,000, because of the changed condition of the picture, and also sought to enjoin the exhibition of the Carmen picture. William M. Seabury of New York, an attorney of the firm of Seabury, Massey and Lowe, was retained by the defendant to represent the defendant in the litigation. Seabury had represented the defendant before in other matters when Anderson was connected with the defendant. Seabury obtained an injunction restraining Chaplin from interfering with the exhibition of the picture "Carmen." The defendant then brought suit for damages in the amount of $500,000 against Chaplin in Los Angeles, California, on a contract between Chaplin and the defendant,

plaintiff has presented this appeal.

The grounds on which counsel for the plaintiff asks for a reversal of the judgment relate mainly to the evidence.

The defendant corporation was engaged in the business of producing moving pictures. Spoor was president of the corporation and owned 52% of the stock. Anderson was a stockholder and owned 48% of the stock. In the year 1916 Anderson sold his stock to Spoor and ceased to be a stockholder in the defendant corporation. Anderson had a joint interest with the defendant in certain pictures which had been produced by the defendant for Charles Chaplin, and which were known as the Chaplin pictures. Anderson's interest in the pictures being 48% and the interest of the defendant being 52%. It was in regard to Anderson's interest in the Chaplin pictures that the contract in question between the defendant and Anderson was entered into. Before the making of this contract litigation had arisen between Chaplin and the defendant concerning the Chaplin pictures. One of the pictures called "Carmen," which was originally made for the reels, was disapproved by the defendant as a four reel picture, and was sent to the distributing office of the defendant for sale and distribution. Chaplin brought suit against the defendant in New York City for damages to his reputation in the amount of $100,000, because of the changed condition of the picture, and also sought to enjoin the exhibition of the Carmen picture. William A. Delaney of New York, an attorney of the firm of [illegible], [illegible], [illegible] by the defendant to represent the defendant in the litigation. Delaney had represented the defendant before in other matters when Anderson was connected with the defendant. Delaney had had an interview with Charlie Chaplin from time to time with the exhibition of the picture "Carmen." The defendant then brought suit for damages in the amount of $50,000 against Chaplin in Los Angeles, California, on a contract between Chaplin and the defendant,

which the defendant alleged Chaplin had broken. The claim of the defendant was that according to the contract Chaplin was to make ten pictures; that Chaplin made only six pictures; that because of Chaplin's failure to make the remaining four pictures, the damages to the defendant, based on a valuation of $125,000 a picture, amounted to a total of $500,000. In this suit the defendant was represented by Oscar Mueller and Albert Wright, attorneys in Los Angeles, who had been engaged by Seabury for the defendant. On the advice of Seabury the suit against Chaplin in Los Angeles was dismissed, and a similar suit was begun against Chaplin by the defendant in New York City, in which the defendant was represented by Seabury. Subsequently, without Chaplin's consent, the defendant made up a composite picture of different parts of fourteen or fifteen Chaplin pictures and called it a "Chaplin Revue." When this picture was released by the defendant for distribution Chaplin brought suit against the defendant, alleging that by reason of the manner in which the picture "Chaplin Revue" was made, his reputation was damaged to the amount of $100,000. The defendant made another picture without Chaplin's consent, called "Triple Trouble," composed of what is called "over takes" of films of Chaplin pictures. Chaplin brought another suit against the defendant for $100,000 for damages to his reputation because of the alleged inferiority of the picture "Triple Trouble." Chaplin also claimed a share of the profits of a picture called "Police," which was one of the pictures he had made under his contract with the defendant, and concerning the profits of which there was apparently a controversy between Chaplin and the defendant. All of the litigation between Chaplin and the defendant was finally compromised after it had been pending several years. Before the compromise was effected the contract in controversy was entered

which the defendant alleges should be proven. The claim of the defendant was that according to the contract Chaplin was to make two pictures; that Chaplin made only one; and damages; that because of Chaplin's failure to make the remaining four pictures, the damages to the defendant, resulted in a reduction of $10,000 a picture, or under or a total of $40,000. In this case the defendant was represented by Mr. Lucien Lundell and Albert Wright, attorneys in Los Angeles, who had been employed by Mr. Mayer for the defendant. On the advice of counsel the suit against Chaplin in Los Angeles was dismissed, and a suit was filed then began against Chaplin by [illegible] in San Jose. This, in which the defendant was represented by Mr. [illegible], without Chaplin's consent, the defendant [illegible] pictures of different parts of Chaplin or [illegible] pictures [illegible] called it a "Chaplin [illegible]." [illegible] was released by the defendant for distribution. Chaplin sued [illegible] against the defendant, alleging that by a [illegible] which was pictures "Chaplin [illegible]" [illegible] damages to the amount of $40,000. The [illegible] pictures without Chaplin's consent, [illegible] composed of what [illegible] pictures. Chaplin [illegible] $100,000 [illegible] interlocutory [illegible] claimed a [illegible] which was one of the pictures [illegible] after the defendant, and [illegible] was apparently a [illegible] between Chaplin [illegible] of the litigation between Chaplin and the [illegible] amphitheater after it had [illegible] company [illegible] compromise was effected [illegible] in [illegible] by the [illegible]

into by the defendant and Anderson. In all of the Chaplin litigation the defendant was represented by Seabury as general counsel, assisted by Max D. Steuer as associate counsel.

The question at issue between the plaintiff and the defendant involves the amount of the expenditures that were made in connection with the litigation regarding the Chaplin pictures.

The method by which the defendant proceeded to prove the expenditures was by introducing documentary evidence from the book accounts and records of the defendant, relating to the Chaplin litigation, and showing by oral testimony that these accounts and records were kept in the regular course of business and were correct. The defendant had a special account known as the "Chaplin legal expenses," and in this account all matters concerning these expenses were kept. The documentary evidence introduced by the defendant consisted in substance of bills rendered to the defendant by Seabury, Massey and Lowe for legal services and disbursements, checks payable to Seabury, Massey and Lowe, Mueller and Wright, and Max D. Steuer, for legal services and disbursements, duplicate remittance vouchers, letters and a telegram. The principal oral testimony on behalf of the defendant relating to the documentary evidence, was given by Spoor, Mrs. Margaret O'Connor Harris, an auditor of the defendant, and James M. Adam, another auditor of the defendant.

Spoor testified that the defendant employed Seabury and that Seabury was "a lawyer of standing at the bar in New York;" that Oscar Mueller and Albert Wright, attorneys in Los Angeles, were engaged by Seabury only to represent the defendant in the Chaplin litigation, and were paid fees by the defendant on the direction of Seabury; that Max Steuer also represented the defendant; that the defendant paid by check fees to all of these lawyers as they rendered their bills; that the bills were ap-

lure by the defendant and another. [illegible] of the [illegible] litigation the defendant was represented by Counsel [illegible] and, assisted by Mr. [illegible] as associate counsel.

The question at issue between the plaintiff and the defendant involves the [illegible] of the expenditures that are made in connection with the litigation [illegible] [illegible] widows.

The method by which the defendant proposes to prove the expenditures was by introducing in evidence the book accounts and records of the department, relating to the Chaplin litigation, and showing by oral testimony that those accounts and records were kept in the [illegible] of business and were correct. The defendant had a special account known as the "Chaplin Trust account," into it [illegible] all moneys connected with these expenses were kept. The [illegible] testimony introduced by the defendant and based [illegible] [illegible] tendered to show [illegible] by Counsel, [illegible] views and [illegible] made [illegible] Love, Kaufman and Trumpf, and Mr. [illegible], [illegible] disbursements, including [illegible] [illegible] and a [illegible] gram. The principal oral testimony on behalf of the [illegible] relating to the department's [illegible], was given by [illegible], Assistant Corporation Counsel, [illegible] Adam, another auditor [illegible].

[illegible] testified [illegible] and that Trumpf was "a [illegible] that Counsel [illegible] and [illegible] were engaged by Cooper only [illegible] Chaplin litigation, and [illegible] direction of Cooper. [illegible] testified; that the [illegible] paid by [illegible] lawyers [illegible]

proved by him, Spoor, and that he gave instructions to the employees in the office of the defendant in regard to "charging the exhibits introduced in evidence and which are charged to the Chaplin suit;" that the checks which were "introduced in evidence were signed by him as president and treasurer" of the defendant; that there was a stipulated amount agreed upon between him, Spoor, and Seabury, but that the amount varied; that Seabury represented the defendant in other matters, but for services in those matters Seabury rendered separate bills; that the checks paid on account of the item marked "retainer" were paid to Seabury for the Chaplin litigation, and that according to his, Spoor's, understanding the item "retainer" did not cover services for any other litigation; that he, Spoor, sent an employee of the defendant named A. J. Callaghan to California in connection with the Chaplin litigation, and that the notations "expense account, Chaplin suits, legal expenses in the Chaplin films," which were made on the exhibits in evidence relative to the expenses of Callaghan, were made by him, Spoor; that he, Spoor, made trips to New York in regard to the Chaplin litigation.

Mrs. Harris and Adam were called as witnesses by the defendant to identify the exhibits which were offered in evidence by the defendant. The exhibits amounted in number to 146. The necessity of identifying each exhibit was obviated by an agreement which was made by the trial attorneys after Mrs. Harris had testified as to exhibits 1 and 2. Mrs. Harris' testimony in this respect was as follows:

> "Exhibit 1 for identification is a check, the amount, date and the name being written by me; the signature 'Essanay Film Manufacturing Company' being printed and the signature 'George K. Spoor' being made by Spoor. That check was made out by me in the regular course of business and was sent to Mueller. With the check I sent the original of the voucher record. Defendants' Exhibit 2 for identification is a record that is a duplicate of the remittance advise that was used, the permanent record for the files. The other was sent to Mueller and this was placed in our files. I made it out during the regular course of business. The words 'Account Chaplin Suit' were placed on there by me. This check

proved by him, upon, or that it was that [illegible]
in the office of the [illegible] in regard to [illegible] the [illegible]
introduced in evidence and a [illegible] to the "[illegible]"
that the events which were "[illegible]" in evidence were claimed by
him as [illegible] "[illegible]" of the [illegible]; [illegible]
stipulated amount agreed upon between [illegible], upon, and [illegible]
that the amount varied; that [illegible] other matters, [illegible] for [illegible]
separate bills; that [illegible]
"retainer" were paid to [illegible] according to [illegible]
event services for any other [illegible]
employee of the [illegible] connection with the [illegible]
account, [illegible] were made [illegible]
Gallagher, were made by him, [illegible]
New York in [illegible]

[illegible] defendant to [illegible]
by the defendant. [illegible]
necessity of [illegible]
which was [illegible]
fied as to [illegible]
was as follows:

> "[illegible]
> and the [illegible]
> [illegible]
> Egger' [illegible]
> [illegible]
> I [illegible]
> for [illegible]
> [illegible]
> the [illegible]
> I made it out [illegible]
> 'Account [illegible]

and Exhibit 2 for identification were made out at the same time about the date they bear. We got the check back the following month, in September, and it has been properly charged to banking account of the Essanay."

At this point in the trial, at the request of the trial attorney for the plaintiff, all of the exhibits were given to him and court was adjourned to the following day in order that he might have an opportunity to examine the exhibits. On the convening of court the trial attorneys agreed that the exhibits should be marked in sequence by the court reporter and should be considered as having been identified and offered in evidence. After the agreement was made, and while Mrs. Harris was still on the witness stand pending a discussion of the objections of the trial attorney for the plaintiff to the exhibits, the trial attorney for the plaintiff said to the court, "There are bills in here from Seabury which have not been properly identified as having been sent or received." The court replied, "Listen a minute. I asked the question in there, you will recall this morning, whether it would be considered that all of these exhibits before being offered had been in fact identified, to which you responded yes." To this the trial attorney for the plaintiff answered, "Well, I had in mind, your Honor, the payments made by the checks." The trial attorney for the plaintiff asked the court, "May I have then a general objection to all of Seabury's bills, and all bills of strangers to the record?" The court stated, "You sure may; and it may be considered that you object to each and every exhibit that is offered." The trial attorney for the plaintiff said, "There are witnesses who know about these things. They ought to produce them and tell those things, qualify their exhibits, instead of just bringing on the bookkeeper or auditor who made them out, and only knows what somebody else told her." The court replied, "Well, that is the reason I asked the question this morning." The trial attorney

and Exhibit 2 for identification were seen at [illegible] about the same time, [illegible] the following month, in September, [illegible] account of the [illegible].

At this point in the trial, the [illegible] counsel as the trial attorney for the plaintiff, [illegible] of the exhibits were [illegible] to him and court was adjourned in the following [illegible] in order that he might have an opportunity to examine the exhibits. At the convening of court the trial attorneys agreed that the exhibits should be marked in sequence by the court reporter and should be considered as having been formally offered in evidence. After the agreement was made, and while the [illegible] was still on the witness stand pending [illegible] the objections of the trial attorney for the plaintiff [illegible] the trial attorney for the plaintiff said to the court, "There are exhibits here from Sebring which have not been [illegible] as having been sent at this [illegible]." The court replied, "[illegible] I asked the question in there, [illegible] whether it would be considered that all of these exhibits [illegible] offered and been in fact [illegible]." To this the trial attorney [illegible] "Yes, sir, [illegible] had in mind, your honor, [illegible]" the trial attorney for the plaintiff [illegible] general objection to all of them [illegible] of strangers to the record." The court stated, "[illegible] may be [illegible] that you [illegible] is offered." The trial attorney [illegible] witnesses who know about [illegible] and [illegible] those things, [illegible] belonging to the [illegible] knows what [illegible]" [illegible] is the reason I raise the [illegible]." [illegible] attorney

for the plaintiff answered, "Well, I misunderstood your Honor then. It is not too late for them to introduce this qualifying evidence now." After further colloquy between the court and the trial attorneys, and without any additional examination of Mrs. Harris as to the exhibits, the record shows the following recital: "Defendant's exhibits 3 to 146 inclusive were each of them received in evidence over the objection of the plaintiff to the rulings of the court in this respect, and the plaintiff excepted. Said exhibits are as follows:"

The direct examination of Mrs. Harris was then resumed and she testified as follows:

"Defendant's Exhibit 18, of my own knowledge, is a statement from Seabury, Massey & Lowe, attorneys for the Chaplin account, was received by the Essanay Company while I was there, in the regular course of business, and came to my attention as auditor. Based upon statements such as that, I made out the check payable to the attorney and then posted it to the proper account. During the time I was with the Essanay people I received a great many statements from this law firm to which I have referred. All statements that came in from Seabury were treated in exactly the same manner. I know A. J. Callaghan, who was at one time employed by the Essanay Film Manufacturing Company and who did a great deal of legal work. Defendant's Exhibit 126 was paid to A. J. Callaghan, who is the party to whom I referred as being employed by the Essanay Company. In connection with defendant's exhibit 127, Callaghan made a trip to California to interview Charlie Chaplin for Spoor. I know this of my own knowledge. I know of my own knowledge that defendant's exhibits 135 and 136 were for Spoor's traveling expenses to New York on account of the Chaplin suits. At the time I was auditor other checks were issued to Spoor, being defendant's exhibits 137 to 146, inclusive, and my answer would be the same with reference to these. Defendant's exhibits 120 and 121 were not prepared by me. The great number of bills from Seabury which were introduced in evidence were received in the regular course of business while I was auditor. When the bill came in, sometimes Spoor got the bill and would then send it to me and tell me tomake out a check payable to Seabury and to mail it to him. After I mailed the check it was charged to the proper account and the invoices placed in the files for persanent record. We had a special account known as the Chaplin legal expenses and these exhibits which have been introduced in evidence were charged to that account. Outside of the exhibits which were made after I left, all the work was done by me personally. I saw Seabury at the Essanay office, 1333 Argyle street. When the checks in evidence were returned, they would be reconciled with the bank account and then filed. The accounts which were sent by Seabury were not always paid in full. Sometimes there would be several months elapse and then

they would be paid on account."

On cross-examination Mrs. Harris testified as follows:

"I know Spoor, who is sitting in the courtroom beside Governor Deneen. I know the meaning of the expression 'of your own knowledge.' I said that Callaghan was employed by the Essanay Company. I was not present when he was employed. I know he was on the payroll, I paid him his salary. He was a lawyer before he came to the Essanay. I know this of my own knowledge. I did not know him before he came to the Essanay. I do not know of my own knowledge what he did before he came to the Essanay. I testified here that Callaghan made a trip to California. I did not see him get on the train. Spoor told me he went to California and told me to make out a check for his traveling expenses. I was not in California when Callaghan interviewed Chaplin and do not know of my own knowledge that he ever did interview Chaplin. I only know what Spoor told me, and correspondence we had with him. I have seen Callaghan's signature, but I do not know that I have ever seen him write it. All that I know about this California trip of Callaghan's and his interview with Chaplin is something that Callaghan told or wrote, or something that Spoor told me as auditor of the Essanay. Defendant's exhibits 135 to 146, inclusive, are checks made out to Spoor or to currency. I know of my own knowledge that Spoor used that money to go to New York. I did not see him get on the train. I knew he was in New York because we had wires from him and correspondence. I did not see him go to New York. I do not know where else he went besides New York; all that I know about these exhibits (defendant's exhibits 135 to 146 inclusive) is that Spoor told me that these expenditures were incurred in the Chaplin suits. I know nothing of the bills and letters from Seabury and Rosenfeldt, or about the contents of the bills, except that the statements were rendered to us. I just know that I received a bill. For instance, in defendant's exhibit 18 Seabury writes that he expended $9.12 in the Chaplin suit, but I just took the statement for what it was and paid it. I don't know anything about these exhibits from 1 to 146, except whatever occurred in the ordinary course of business and the statements to verify. I received all these statements and letters and they were O. K.'d by Spoor for payment. He would not always initial them. I would ask him if it was all right to pay and he would say, 'Yes, just make out a check for it.' I guess I did that every time. I got Spoor's O. K. every time before I made out the check. The O. K. was not in writing, but was given verbally. He told me what the expenditure was for and what it was to be charged to. That is all I know about it."

At the conclusion of all the testimony of Mrs. Harris the trial attorney for the plaintiff made the following motion:

"I move to strike every exhibit from the record except checks on the ground that they have been identified by a witness who knows nothing about them, except by hearsay, and the fact that Mr. Spoor is in the courtroom is a presumption that the proper evidence is available."

they would be said on account.'

In a [illegible] manner, [illegible]

'I know nothing, who is [illegible] the operations behind Governor Dorsey. I know [illegible] an expression of your own knowledge.' I said that [illegible] was employed by the Kansas Company. I was not [illegible] than [illegible]. I know he was on the payroll, I [illegible] in the [illegible] lawyer before he came to the Kansas. I [illegible] knowledge. I did not know him [illegible] I do not know of my own knowledge who [illegible] the Kansas. I [illegible] California. I did not see him [illegible] the street. [illegible] he went to California [illegible] travelling expenses. I was not in California when [illegible] interviewed Chapin [illegible] he ever did interview Chapin. I only know what [illegible] and correspondence [illegible] signature, but I do not know that I have ever seen his write it. All that I know about this [illegible] and his interview with Chapin is [illegible] told or wrote, [illegible] the Kansas. [illegible] checks made out to Dorsey or [illegible] knowledge that Dorsey used that [illegible] not see him get on the stage. I [illegible] come we had [illegible] him go to New York. [illegible] New York; all that I know about [illegible] [illegible] [illegible] expenditures were [illegible] in the [illegible]. I know [illegible] of the bills was [illegible] the contents of the bills, except [illegible] heard to me. I just know [illegible] in [illegible] in the Chapin suit, [illegible] was not paid [illegible] from 1 to 100, except [illegible] of business and the [illegible] to verify. I [illegible] statements and letters [illegible] ments. He would not always initial them. I [illegible] was all right to go [illegible] about it for it.' I guess I did [illegible] C. K. every time [illegible] not in writing, but was given verbally. [illegible] expenditure was [illegible] all I know about it.'

At the conclusion [illegible]

the trial attorney for the [illegible]

'I have testified [illegible] made on the [illegible] Kansas knows nothing about [illegible] fact that Dorsey is [illegible] [illegible] other witness in [illegible].

The court denied the motion and held that the exhibits properly were admissible in evidence.

Adam testified in regard to certain exhibits which he prepared and certain exhibits which he received in the regular course of business while he was auditor of the defendant.

Anderson, who was the only witness called on behalf of the plaintiff, testified in substance as follows:

"Except for defendant's exhibits 9 and 11, I had never had a close look at defendant's exhibits 1 to 146 inclusive, until I looked at them in your (the trial attorney for the plaintiff) office on Friday. The first time I saw them at all was when they were produced here at the trial. The first time that I knew that the Chaplin litigation had been settled, and the first time that I heard anything about it was when Spoor testified here in court. I think he testified Friday. I was never present at a conference with Spoor and Seabury at the Republican Club in New York. There was a controversy over the picture 'Carmen.' The Essanay suit against Chaplin was for damages caused by Chaplin breaking his contract with the Essanay. Chaplin was receiving $1250 a week as pay under his contract, which was the first contract we had with Chaplin. The second contract, which we claimed that he broke, was for $1250 a week and $10,000 bonus for each picture. He was to make ten pictures, but made only six and we were suing for the value of four. His next contract was with a firm called the Mutual. As I understand it, Chaplin filed a counterclaim against the Essanay for damages caused by our releasing 'Carmen.' I never saw the complaint or anything, only what Spoor told me. I understand there was a counterclaim for damages for releasing 'Carmen,' jeopardizing his artistic reputation. The first time I heard about the Chaplin suit or litigation based on the picture 'Triple Trouble' was in this courtroom. The first time I ever heard about Chaplin's counterclaim based upon 'Chaplin Revue' was when Governor Deneen spoke about it in this courtroom. March 27, 1919, was the date of my conversation with Spoor concerning the sale of the pictures. I paid the Essanay all my share of the expenses, costs and attorneys' fees in the Chaplin litigation up to the time of that contract. (Plaintiff's exhibit 6.) I don't know the exact amount that I paid as my share of the expenses in the Chaplin litigation incurred before May 27, 1919, but I think that my share was around $15,000 or $16,000, which I think was on the books at the time when we went into the contract. I do not know anything about the pictures 'Triple Trouble' and 'Chaplin Revue,' and I don't know whether or not they had been put together on May 27, 1919. I saw 'Triple Trouble' advertised in the periodicals in 1920 or 1921, I don't recall the exact date."

From the exhibits it appears that with the exception of an item of $1600 paid to Spoor for traveling expenses in connection with the Chaplin litigation, and an item of $693 paid to Callaghan

for expenses in connection with the Chaplin litigation, the remainder of the total expenditures of $47,881.29 was paid to Seabury, Massey & Lowe, Mueller & Wright, and Steuer for services, expenses and costs as attorneys for the defendant in the Chaplin litigation.

The contentions of counsel for the plaintiff, which are numerous, may be grouped under three headings: First, general objections to the admissibility of the evidence; second, specific objections seeking to impeach or discredit certain items of the expenditures; third, that the verdict is manifestly against the weight of the evidence.

Under the general objections counsel for the plaintiff contend that the statements and bills of the attorneys and Callaghan have not been proved properly; that the statements and bills should have been proved by the testimony of Seabury, of the firm of Seabury, Massey & Lowe; by Wright and Mueller; by Steuer and by Callaghan; that the reasonableness of the statements and bills of the attorneys and Callaghan and Spoor has not been shown; that letters of Seabury, Seabury, Massey & Lowe, a letter of Wright, and a telegram signed "Shogren" were not admissible in evidence.

Counsel for the defendant maintain that in view of the agreement on the trial that the exhibits should be considered as having been identified and offered in evidence, counsel for the plaintiff cannot now contend that the exhibits have not been proved properly. If only the agreement was in the record, the contention of counsel for the defendant would be correct; for when considered in connection with the identification of exhibits 1 and 2 by Mrs. Harris, the word "identified" as used in the agreement undoubtedly was intended to mean that all of the exhibits should be considered as having been explained and authenticated sufficiently to establish prima facie proof of their admissibility in evidence. This meaning

which we have ascribed to the word "identified" as used in the agreement, is in accord with the following definition of the word "identify" given by Webster's New International Dictionary: "To prove the same (with something described, claimed or asserted)." But the objections of the trial attorney for the plaintiff and the colloquies between him and the court after the agreement was made, indicate that the trial attorney for the plaintiff did not appreciate the full force and effect of the word "identified" as used in the agreement. And the court allowed him to enter a "general objection to all of Seabury's bills and all bills of strangers to the record." In this state of the record, and also in view of all of the testimony of Mrs. Harris and Adam, we think that a fair interpretation of the situation would be that the trial attorney for the plaintiff agreed, in effect, that the auditors of the defendant would testify that all of the exhibits about which no testimony was given, constituted records of the defendant, which belonged to the account known as "Chaplin Legal Expenses," and which were kept in the regular course of business by the auditors under the direction of Spoor.

In this view counsel for the plaintiff have the right to question the sufficiency of the evidence relating to the exhibits. No objection is made by counsel for the plaintiff in regard to the proof of the checks paid to the attorneys for services, expenses and costs in the Chaplin litigation. The objections of counsel for the plaintiff relate to the bills and statements of the attorneys. These bills and statements, counsel for the plaintiff contend, are hearsay evidence since the attorneys did not authenticate them. Even so we do not perceive how the plaintiff was prejudiced. The bills and statements were merely corroborative evidence to explain the purpose for which the checks were paid. The checks were the essential evidence of the expendi-

which we have ascribed to the word "identified" as used in the agreement, is in accord with the following definition of the word "identify" given by Webster's New International Dictionary: "To prove the same (with some thing described, claimed or asserted)." But the objections of the trial attorney for the plaintiff and the colloquies between him and the court after the agreement was made, indicate that the trial attorney for the plaintiff did not appreciate the full force and effect of the word "identified" as used in the agreement. And the court allowed him to enter a "general objection to all of Bentley's bills and all bills of stockyards to the record." In this state of the record, and also in view of all of the testimony of Mr. Harris and others, we think that a fair interpretation of the stipulation would be that the trial attorney for the plaintiff agreed, in effect, that the auditors of the defendant would testify that all of the exhibits then and there in testimony was given, constituted records of the defendant, which belonged to the account known as "Chicago Legal Department," and that were kept in the regular course of business by the auditors in the discharge of duty.

In this view counsel for the plaintiff have no right to question the sufficiency of the evidence relating to the reliability. No objection was made by counsel for the plaintiff in regard to the proof of the [illegible] of the attorneys or witnesses, appearing and testifying in the display list action. The objections of counsel for the plaintiff relate to the filing and introduction of the attorneys. These bills and statements, against the plaintiff contend, are hearsay evidence since the attorneys did not authenticate them. Even so, it is not material how the plaintiff was prejudiced. The bills and statements were corroborative evidence in support of the [illegible] that they were paid. The witnesses were the essential evidence of the payment.

tures of the defendant under the provision in the contract in question for "cost and expense in the prosecution and defense" of the Chaplin litigation.

We are of the opinion, however, that the bills and statements were not hearsay evidence, and were admissible without the authentication of the attorneys and Callaghan. The determination of this question depends on the relationship between the defendant and Anderson, the assignor of the plaintiff. The question of relationship between the defendant and Anderson has not been discussed by counsel for the plaintiff. From their argument in this respect and the authorities cited in support of their argument, it would appear by implication that counsel for the plaintiff considered the relationship between the defendant and Anderson as that of strangers. In our opinion the defendant and Anderson were joint adventurers. By the terms of the contract in question they were engaged in a joint adventure in connection with the Chaplin litigation, in which each was to share in proportionate amounts the profit and expense of the Chaplin litigation. The question whether a corporation may engage in a joint adventure is not involved, as both the defendant and the plaintiff are relying upon the validity of the contract, the legal effect of which in our opinion constitutes the plaintiff and the defendant joint adventurers. It may be stated that in Illinois the rule is that a corporation cannot enter into a partnership. Bishop v. American Preservers Co., 157 Ill., 284, 313; Rogers v. Jewell Belting Co., 184 Ill., 574, 577. But, according to Corpus Juris, 14A, p. 293, "notwithstanding a corporation has no power to enter into a partnership, it may under a joint venture with others transact any business which is within the scope of its legitimate powers and thereby become liable on account of the fiduciary relation thus assumed."

The rule is well settled in Illinois that joint adventures, although not strictly partnerships, closely partake of the nature of partnerships, and are governed by the rules and principles relating to partnerships. Slater v. Geo. M. Clark & Co., 68 Ill. App. 433, 437; Hull v. Parsons, 145 Ill. App. 436, 438; Edwards v. Hudson, 165 Ill. App., 521, 528. To the same effect are 15 R. C. L., p. 500; 23 Cyc, p. 453.

The general rule in regard to the admissibility in evidence of partnership books against partners, as stated by Ruling Case Law, is "that partnership books are admissible in evidence for the purpose of showing the state of the partnership affairs, even when the entries are made by one partner alone, provided that the partners have access to the books and an opportunity to object to the entries in question." 20 R.C.L., section 153, p. 934. To the same effect is 30 Cyc, 743. It is also the rule that in case all the partners have had free access to the books, the entries in the books will be deemed accurate and the presumption will arise that they were known to each partner. 30 Cyc, p. 447.

In the case of Stuart v. McKichan, 74 Ill., 122, in stating the rule in regard to the presumption of the correctness of partnership books as between partners, the court said (p. 124):

> "When the cause was before the master the books of account and vouchers were produced before him, and before the court also, in considering the exceptions. Those books are presumed to contain a true history of the business, and a true record of the transactions between these partners."

In the case of Allen v. Coit, 6 Hill (N.Y.), 318, speaking of partnership books, the court said (pp. 321, 322):

> "As to the entry in the books of the defendants, they must all be taken to have had constructive knowledge of it; and it appears they probably had knowledge in fact. As members of the firm, they were affected by the entry, whether made by themselves or their agent Thornton. They must moreover be presumed to have understood its true import. Indeed, the knowledge of their agent was, in this respect, their own knowledge; and the judge was right in allowing him to explain the meaning of the

The rule is well settled in Illinois that joint adventurers, although not strictly partners, usually possess of the nature of partnerships, and are governed by the rules and principles relating to partnerships. Gilmer v. Gore, 2 Ill. App. 3d 58 Ill. App. 424, 427; Hull v. Pitcher, 144 Ill. App. 478, 482; Schwartz v. Hyman, 108 Ill. App., 378, 382. It is some effect are 18 N. E. L. R. 300; 75 Ill., p. 482.

The general rule in regard to the admissibility in evidence of partnership books against such one, as stated by Bailey Dunn Law, is "that partnership books are admissible in evidence for the purpose of showing the state of the partnership affairs, even when the entries are made by one partner alone, provided that the partners have access to the books and an opportunity to object to the entries in question." 20 C.J.S., section 183, p. 688. To the same effect is 30 Cye, 144. It is also the rule that in case all the partners have had free access to the books, the entries in the books will be deemed accurate and the presumption will arise that they were known to and partner. 30 Cye, p. 447.

In the case of Gilmer v. Williams, 74 Ill., 108, in stating the rule in regard to the admission of a partnership books as between strangers, the court said (p. 108):

> "When the dealer was indeed a member of the firm of Williams and Vandyke and brought before him, as a member of the firm also, in consulting the accounting. These books are presumed to contain a true history of the business, and a true record of the transactions between these parties."

In the case of Allen v. Hall, 6 Ill. (4.V.), 479, speaking of partnership books, the court said (p. 271, 308):

> "As to the entry in the book of the debt, it is, they must all be taken to have had constructive knowledge of it; it appears they probably had knowledge in fact. As matters of the time, they were affected by the entry, which was made by their agent or their agent therefor. They must account for gross and to have understood the true transaction. Neither, too, is knowledge of their agent was, in this respect, their own knowledge; and the judge was right in allowing him to explain the meaning of the

entry, if there was any thing in it which could be considered obscure."

We are of the opinion that the rules relating to partnerships, which are also the rules governing joint adventures, are sufficiently broad to justify the admission of the bills and statements in the case at bar on the proof made by the auditors of the defendant, together with the testimony of Spoor. And we are of this opinion notwithstanding that the matter of the Chaplin litigation was conducted exclusively by the defendant without the active participation of Anderson. The clear implication of the contract in question is that Anderson's co-adventurer, the defendant, or rather Spoor, who in fact was the defendant, was to conduct the matter of the Chaplin litigation either as Anderson's co-adventurer or in the nature of Anderson's agent. But as the law of partnership is a branch of the law of agency, the functions, rights and duties of partners in a great measure comprehend those of agents and the general rules of law applicable to agents likewise apply to partners. 20 Ruling Case Law, section 94, p. 882. It is the duty of an agent to keep accounts of the subject matter of the agency as to both receipts and disbursements, and to render to his principal a full and complete statement of his dealings, and of the state of the accounts, supported by proper vouchers. 2 Corpus Juris, section 404, p. 738.

Anderson testified that the first time that he ever saw the exhibits was at the trial. That is immaterial. He had the legal right to inspect the books and accounts at any time during the progress of the Chaplin litigation. There is no evidence that he was ever denied access to the books and accounts. He therefore must be regarded as having approved by acquiescence of the books and accounts. Turner's Executor v. Turner, 98 Md. 22, 31. Furthermore, the record shows that all of the exhibits

entry, if there was any crime in it which could be considered obscene."

To one of the opinions [illegible] in particular, which was also the [illegible] are sufficiently broad to justify the [illegible] statements in the case at bar on the great [illegible] of the defendants, together with the testimony of [illegible], and as are of this opinion notwithstanding that the [illegible] litigation was conducted exclusively by the [illegible] entire participation of Mr. [illegible]. The [illegible] of the contract in question is that Lubrecht's [illegible], the defendant, or rather [illegible], who [illegible] as the [illegible], was to conduct the matter of the Jeffries litigation either as [illegible] or in the nature of [illegible]. This is not the [illegible] of particularly [illegible] rights and duties [illegible] of people and a general rule of [illegible] to [illegible] also apply to [illegible]. It is the duty of a court to [illegible] of the [illegible] to his principal a full and [illegible] of his conduct and of the [illegible] the [illegible], supported by [illegible]. 2 George Davis, section 641, p. 743.

[illegible] was at [illegible] the Legal right to [illegible] [illegible] during the [illegible] of the [illegible]. [illegible] [illegible] the [illegible] of the [illegible] and [illegible]. [illegible] 21, 22. [illegible], the [illegible]

were in the possession of counsel for the plaintiff from an adjournment of the court on Friday until court convened on the following Monday, and that Andersen examined the exhibits during that time.

Counsel for the plaintiff urge many specific objections to the exhibits. The basis of the objections is the internal evidence of the exhibits themselves. No evidence whatever was offered or introduced on behalf of the plaintiff directly to impeach or discredit any of the exhibits. The only testimony on behalf of the plaintiff was that of Anderson, and his testimony does not relate specifically to the exhibits.

The first specific objection of counsel for the plaintiff to the exhibits is in regard to the word "retainer," which appears on some of the exhibits and which was used to designate a monthly payment to Seabury, Massey & Lowe for legal services in connection with the Chaplin litigation. Counsel for the plaintiff contend that we should take judicial notice that "there is no such thing as a general retainer billed monthly for a single particular law suit;" that we should take judicial notice that retainers are of two kinds only - "Special retainers given to secure the services of a particular attorney in a particular case, the retainer fee being paid, once and for all, when the attorney is engaged;" and "General retainers given to secure the services of a particular attorney in any and all matters which might arise, having no reference to any particular case, the retainer fee being paid monthly or yearly, inasmuch as the engagement is indefinite in duration." Counsel for the plaintiff then argue that "It would be unreasonable to believe that the defendant would enter into such a monthly 'retainer' contract with Seabury, Massey & Lowe."

were in the possession of counsel for the plaintiff then [illegible] journment of the court on [illegible] by the court [illegible] the following orders, [illegible] opinions regarding the exhibits [illegible] that time.

Counsel for the [illegible] objections to the exhibits. The [illegible] of the [illegible] nal evidence of the [illegible], it [illegible] was offered or [illegible] to im- peach or discredit any of the exhibits. [illegible] on behalf of the plaintiff [illegible], and [illegible] does not relate specifically to the exhibits.

The last [illegible] tiff is the [illegible] which appears [illegible] the exhibits [illegible] a monthly payment to [illegible], [illegible] in connection with the [illegible] litigation. [illegible] tiff contends that [illegible] such thing as a general retainer [illegible] ticular [illegible]; [illegible] tainers are of two [illegible] the services of [illegible] retainer fee [illegible] engaged; [illegible] particular [illegible] having no reference to [illegible] paid [illegible] in [illegible]. [illegible] would be [illegible] into [illegible] [illegible]."

The answers to these contentions of counsel for the plaintiff are that the real issue is whether monthly payments in fact were made by the defendant to Seabury, Massey & Lowe for legal services, and not by what name the payments were designated; that there is evidence on behalf of the defendant that the payments were made, and that there is no evidence on behalf of the plaintiff that they were not made; and that even if we should take judicial notice that the word "retainer" has only the two meanings which counsel for plaintiff have indicated, we would not be justified to infer from that fact alone that the evidence on behalf of the plaintiff that the monthly payments were made to Seabury, Massey & Lowe was not true.

Counsel for the plaintiff further contend that the monthly "retainer" which was paid to Seabury, Massey & Lowe, included legal services for other matters besides the Chaplin litigation.

This contention of counsel for the plaintiff is not based on any evidence. On cross-examination of Spoor, counsel for the plaintiff brought out the fact that Seabury, Massey & Lowe represented the defendant in other matters than the Chaplin litigation; but Spoor stated that it was not his understanding that the retainer included legal services for other matters than the Chaplin litigation. There is no evidence on behalf of the plaintiff that the monthly "retainer," which was paid to Seabury, Massey & Lowe, included legal services for other matters than the Chaplin litigation.

Counsel for the plaintiff contend "That fees and disbursements, paid to Mueller & Wright in 1918 were not solely for the Chaplin litigation but included other matters." No evidence was offered by the plaintiff in this respect, and there is nothing in the evidence on behalf of the defendant which, in our opinion,

[illegible] Romeo and Juliet [illegible] suggest that the plaintiff's [illegible] real issue is another and [illegible] separate in fact were made by the defendant in January, [illegible] for legal services, and [illegible] that the payments were [illegible] that there is evidence on behalf [illegible] that the payments were made, [illegible] there is no evidence on behalf of the defendant that they were not made; [illegible] notice that the word "relationship" has only [illegible] counsel for plaintiff [illegible] to infer from that [illegible] the plaintiff [illegible] Love was not [illegible].

[illegible] monthly "retainer" [illegible] included legal expenses [illegible] litigation.

[illegible] based on [illegible] the plaintiff [illegible] reasoned [illegible] tion; but [illegible] relations [illegible] life [illegible] that the sum by "retainer" [illegible] Love, initially [illegible] litigation.

[illegible] Duncombe, [illegible] the Chapin litigation [illegible] was alleged [illegible] in the evidence [illegible].

would justify the conclusion of counsel for the plaintiff.

Counsel for the plaintiff contend that a telegram referred to as the "Shegren telegram" was not admissible in evidence. This telegram, which was sent to Alfred Wright, Los Angeles, California, from Chicago, is as follows: "Mr. Spoor out of city. Letter will receive attention on return few days. E. Shegren, Secretary." In the order in which the exhibits were introduced this telegram follows a letter from Wright to Spoor and was probably in answer to that letter. The telegram was never offered by the defendant as a separate item of evidence. The objection of the trial attorney for the plaintiff to the telegram was made after the agreement had been entered into between the trial attorneys that all of the exhibits should be considered as having been identified and offered in evidence. Granting, for the sake of argument, that the telegram was admitted in evidence improperly, the harmless, insignificant nature of the telegram is so obvious that we cannot believe that counsel for the plaintiff seriously contend that the error would constitute reversible error.

Counsel for the plaintiff maintain that "the remittance advices were not admissible in evidence."

The evidence shows that when a check was made out an original voucher and a duplicate voucher were also made out. The original voucher was sent with the check. The duplicate voucher was kept in the files of the defendant. Counsel for the plaintiff contend that the remittance vouchers were self-serving statements. We think that the contention is without merit. The checks constituted the evidence of the expenditures and the checks are not objected to by counsel for the plaintiff. The remittance vouchers were not evidence of any expenditures, but were merely made out as a matter of bookkeeping. Furthermore, the remittance vouchers were not self-serving statements as between strangers, but were admissible in

evidence as part of the records relating to the joint adventure in which the defendant and Anderson, the plaintiff's assignor, were co-adventurers.

Counsel for the plaintiff contend that "the alterations, notes and arithmetic" which appear on some of the exhibits should have been explained.

A sufficient answer to this objection is that the objection was not made on the trial. The rule requiring an explanation of alterations on a document offered in evidence, is that if the alterations are material, the party offering the document may be required to explain the alterations satisfactorily to the court before the document will be admitted in evidence. Gage v. City of Chicago, 225 Ill., 218, 220.

Counsel for the plaintiff contends that certain letters written to the defendant by Seabury, Seabury, Massey & Lowe, and Wright, should not have been admitted in evidence for the reason that the signatures to the letters were not proved.

The contents of all of the letters show that they relate to the Chaplin litigation. For that reason we think that the letters were admissible in evidence as part of the records in the joint adventure in which the defendant and Anderson, the assignor of the plaintiff, were interested as co-adventurers.

The items in regard to the expenses of Spoor and Callaghan are objected to by counsel for the plaintiff.

We think that the testimony of Spoor and Mrs. Harris in regard to those items justified their allowance. There is no evidence in the record contrary to the testimony of Spoor and Mrs. Harris.

It is objected by counsel for the plaintiff that the jury were allowed to have the exhibits; that some of the items claimed as part of the set-off of the plaintiff were checked in red ink; that some of the exhibits contained items that did not consti-

[illegible]

tute part of the claim of set-off of the plaintiff; that the jury were confused by the mass of the exhibits.

The answer to these objections is that the exhibits were given to the jury at the explicit request of the trial attorney for the plaintiff. Furthermore, in regard to the items not claimed as part of the defendant's set-off, it was expressly agreed in the presence of the jury that those items should not be allowed; and the verdict of the jury indicates that they were not allowed.

Counsel for the plaintiff maintain that "the jury had no right to disregard the uncontradicted testimony of Anderson." The testimony of Anderson was not directly contradicted, but his testimony was contrary to the evidence on behalf of the defendant. We attach little weight to Anderson's testimony. His testimony was indefinite and unconvincing. On the question whether he had paid all of his share of the expenses, costs and attorney's fees in the Chaplin litigation, he stated that he had, but did not know the exact amount. In answer to the question whether he could state the approximate amount he replied, "I t ink the approximate amount was something -- my share of around fifteen or sixteen thousand dollars, I think that was on the books at the time when we went into that contract." Anderson did not produce any checks or receipts to corroborate his testimony.

Counsel for the plaintiff contend that "the defendant's unauthorized settlement of the Chaplin litigation released the plaintiff, as Anderson's assignee, of its obligation to pay 48 per cent of the cost and expense of the prosecution and defense thereof;" that "authority to prosecute or defend does not include authority to settle."

We do not think that the settlement of the Chaplin litigation by the defendant was unauthorized. In our opinion the defendant had implied power under the contract in controversy,

either as agent or co-adventurer of Anderson, the assignor of the plaintiff, to settle the Chaplin litigation. As a co-adventurer of the defendant, Anderson was entitled to take part in the management of the enterprise. 30 Cyc, p. 446. However, he left the entire management of the business to the defendant and must be considered as having acquiesced in the settlement.

It is contended by counsel for the plaintiff that "the cross examination of Spoor by the trial attorney for the plaintiff was unduly restricted."

It is hardly necessary to cite authorities in support of the familiar rule that the latitude to be allowed on cross-examination rests largely in the discretion of the trial court, and that a judgment will not be reversed unless it is clear that the discretion has been abused. Brennen v. Cartersville Coal Co., 241 Ill., 610, 622; Chicago City Ry. Co. v. Creagh, 207 Ill., 400, 402, 403. In the case at bar we do not think that the court abused its discretion.

The final contention of counsel for the plaintiff is that "the expenses of the 'Carmen' litigation were not proper matter for set-off," for the reason that the suit in respect of the 'Carmen' matter had been dismissed before the contract in controversy was entered into; and that "the contract covered only such suits as were pending on the date" of the contract.

The clause of the contract relied on by counsel for the plaintiff is as follows: "Cost and expense in the prosecution and defense of any and all suits at law now existing and of date of May 27th or previous thereto in the Federal or State courts between Charles Chaplin and Essanay Film Mfg. Co. (the defendant.)" In the contract as written there is no comma between the words "existing" and "date," but counsel for the plaintiff contend that there should be and that with such punctuation

the contract contemplates only Chaplin litigation that was pending on the date of the contract. We do not adopt the construction which counsel for the plaintiff contend should be given to the clause in question. In our opinion the clause included all of the Chaplin litigation either pending or disposed of on the date of the contract.

For the reasons stated the judgment of the trial court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

17.

(5)

Abstract only

240 I.A. 677

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the seventh day of April, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JUL[illegible] 19[illegible]5 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to wit:

7457 Agenda 15.

Richard J. Collins,
appellant,
vs.
Harry E. Parker, Jr., Minnie M. Ohls and Charles L. Ogden,
appellees,

Appeal from the Circuit Court of Knox County.

240 I.A. 677

Jett, J.

Richard J. Collins, appellant, filed a bill to foreclose a mortgage on certain real estate in the City of Galesburg, Knox County, Illinois. Appellee Charles L. Ogden, answered, and filed a cross bill by leave of the court. All defendants were defaulted except Ogden. The cause was referred to the Master in Chancery. The Master filed his report and recommended that the cross bill of Charles L. Ogden be dismissed for want of equity; that the original bill filed by Richard J. Collins should be dismissed for lack of proof of ownership of the instrument sued on. Objections were filed to the report of the Master and overruled, and said objections were allowed to stand as exceptions to the said report of the Master. The chancellor entered a decree dismissing the original bill filed by the said Richard J. Collins for want of equity and also dismissed the cross bill of Charles L. Ogden for the same reason. Richard J. Collins appealed from the order dismissing his bill.

For the purpose of this opinion the appellant hereinafter shall be called complainant, and as no one claims to have any interest in this proceeding on the part of appellees except appellee Ogden, he will be referred to as defendant.

It appears that Richard J. Collins, complainant, on May 12, 1923, filed his bill in the circuit court of Knox county alleging that on or about July 10, 1897, Kate L. Parker, late of said county, and Harry E. Parker, Jr., her husband, being indebted to O. F. Price in the sum of $1,000.00, made and delivered their promissory note of that date for said sum, due two years after the date thereof with interest at the rate of seven per cent (7%) per annum. To secure

Vs.

Harry H. Horton, Jr., [illegible]

M. Ohle and Theron [illegible], [illegible]

appellees.

Jett, J.

Richard V. Collins, [illegible] filed a bill to foreclose a mortgage on certain real [illegible] in the city of [illegible], Illinois. [illegible] appellees [illegible] defendants, [illegible] bill by leave of the court. [illegible] Ogden. The [illegible] filed his [illegible] Ogden be dismissed [illegible] Richard V. Collins [illegible] ship of the interest [illegible] of the Master [illegible] stand as [illegible] entered [illegible] Richard V. Collins [illegible] bill of Walter L. Ogden [illegible] appealed from [illegible].

For [illegible] be called [illegible] this proceeding [illegible] will be [illegible].

It appears [illegible] 1923, filed his bill in the [illegible] that on [illegible] and Harry H. Horton [illegible] in the sum of [illegible] of that date for [illegible] with interest at the rate of [illegible].

said note the said Kate L. Parker and Harry E. Parker, Jr., executed a mortgage and conveyed to O. F. Price certain real estate situated in Knox county, namely, Lot 1, Block 10 in Gale's Second Addition to the City of Galesburg; that said mortgage was duly acknowledged and entered of record. Default having been made in the payment of the note, complainant, possessor of the note and mortgage filed his bill of complaint with the result as above indicated.

It appears that Charles L. Ogden, defendant, claimed to be the owner and possessor of the lands and premises described in the mortgage given to secure the said note and that he contested the right of the complainant to a decree of foreclosure. His cross bill was dismissed, and he did not appeal from the order dismissing it. He argues only these questions in opposition to the contention of complainant.

1. Does the possession of the note and mortgage by appellant, and his introduction of them in evidence without any explanation as to when, where, from whom and for what consideration, if any, he acquired them, constitute a prima facie case upon which he can sustain his bill?

2. Has the Statute of Limitations run against the note and mortgage?

3. Was error committed in refusing appellant's motion for leave to re-open the case for the purpose of introducing additional testimony?

The principal question involved in this proceeding is as to whether or not it is shown by the evidence that the complainant is a legal holder and owner of the note secured by the mortgage sought to be foreclosed. Complainant contends that he became the owner and possessor of said note by the indorsement of the same to him by E. B. Wade.

The abstract shows that the following stipulation was entered into:

"It is hereby stipulated and agreed by and between the said complainant and the defendant, Charles L. Ogden, by their respective

said note the said Kate L. Cooper and [illegible], [illegible], [illegible] a mortgage and delivered to [illegible]. This document [illegible] in Knox county, Kentucky, Book 1, [illegible] the State [illegible] the City of Louisville, that [illegible] entered of record. Twelve [illegible] been made on the [illegible] of the note, complainant, [illegible] of the note and [illegible] of complaint who is known as [illegible].

It appears that Charles L. Cooper, [illegible], [illegible] owner and possessor of the [illegible] gage given to secure the said note [illegible] the complainant to a decree of foreclosure. [illegible] released, and he did not appeal from the order [illegible]. [illegible] argues only these questions in opposition to the contention of complainant.

1. Does the possession of the note and [illegible], and the introduction of them in evidence, [illegible] to whom, where, from whom and [illegible] required them, constitute [illegible] upon [illegible] his bill?

2. Has the [illegible] of limitations [illegible] gage?

3. Has error committed in [illegible] to re-open the case for [illegible] money?

The principal question involved [illegible] whether or not it is shown by the [illegible] legal holder and owner of the note [illegible] be foreclosed. Complainant contends that [illegible] possessor of said note by the indorsement [illegible] L. Cole.

The indorsement shows on a [illegible] into:

"It is hereby stipulated and agreed [illegible] complainant and the defendant, Kate L. Cooper, [illegible]

solicitors, that Laura S. Price and Laura Price Moore named on the back of the note sued on in said cause and secured by the mortgage therein sought to be foreclosed was one and the same person.

It is further stipulated and agreed by and between the said parties, that the said note was assigned and delivered by the legal holders and owners thereof to one E. B. Wade, who is named on the back of said note as the assignee thereof, and that the said E. B. Wade thereby became and was the legal holder and owner of said note.

It is further stipulated and agreed that the name "E. B. Wade", appearing on the back of said note, in the right-hand corner thereof, is in the hand-writing of E. B. Wade, and that the original note and mortgage, together with all indorsements thereon, shall be considered as substituted for the copies thereof heretofore offered in evidence by counsel for complainant, subject to the right of defendant Ogden to object to such offer as hereinbefore observed in the record".

The record discloses that the note and mortgage in question were in the possession of complainant and were offered and admitted in evidence. It is the contention of complainant that the possession of the note is prima facie evidence that he is the owner and holder thereof. Ramsom vs. Jones, 1 Scam. 293.

In the case of Curtis vs. Martin, 20 Ill. 557-577, the court among other things said:

> "The ninth instruction was properly given as the principle that the holder of a note, when there are no circumstances of suspiction of mala fides, is presumed to be the legal holder and owner. This principle is too familiar to require discussion or authority."

In the case of Jewett vs. Cook, 81 Ill. 263, the court said:

> "Baldwin holds a note of Mrs. Stark given for the goods, how, or of whom he obtained it, or what he paid for it, is not shown. We cannot, however, presume he obtained the note dishonestly, without proof, neither can it be presumed he did not pay value for, or did not own it; but, on the other hand the possession of the note was prima facie evidence of ownership."

In First National Bank of Princeton vs. Ficklin, 185 Ill. App. 381-382, the court said:

> "Where the execution of a note is not denied, the note when offered in evidence makes a prima facie case for plaintiff, including the fact of plaintiff's ownership."

solicitors, that [illegible]

back of the note and [illegible]

therein [illegible]

It is further [illegible]

partles, that the [illegible]

holders and [illegible]

back of said note [illegible]

made thereby [illegible]

It is further [illegible]

appearing on the [illegible]

is in the hand-[illegible]

mortgage, [illegible]

ed as substitute for [illegible]

dence by [illegible]

Ogden to object [illegible]

The [illegible]

were in the possession of [illegible]

in evidence. It is the conversion of [illegible]

of the note is prima facie evidence [illegible]

thereof. Hanson vs. Jones, [illegible]

In the case of [illegible]

among other things said:

> "The mere institution [illegible]
> that the holder of a note [illegible]
> suspicion of [illegible]
> and owner. [illegible]
> omission or authority."

In the case of [illegible]

> "Belvin holds a [illegible]
> or of whom he obtained it, [illegible]
> We cannot, in [illegible]
> without proof, [illegible]
> for, or did not [illegible]
> of the note was [illegible]

In Tiffany Nation [illegible]

881-82, the court [illegible]

> "Have the execution [illegible]
> offered in evidence [illegible]
> implying the fact of [illegible]

The execution of the note being admitted by the answer of the defendant and there being no plea, verified or otherwise, denying the assignment of the note, complainant was not required to prove the maker's or payee's or assignee's signature, but the assignment thereof was, in the absence of such plea, admitted. Astry vs. Fox River Distilling Company, 182 Ill. App. 340.

The right to the possession and beneficial interest in an unendorsed negotiable paper may pass by manual delivery of the paper, and in the absence of testimony tending to disapprove that the notes were delivered the presumption will obtain that one in the possession of such paper came rightfully into possession. Martin vs. Martin, 174 Ill. 371-374.

There is no evidence that tends to show that the complainant did not come into possession of the note and mortgage honestly.

It is conceded that E. B. Wade had been the legal holder and owner of the note in controversy and that his signature appears on the back thereof. The following also appears on said note:

> "For a valuable consideration I hereby assign, transfer & sell all my right, title and interest in and to the within note and the mortgage which secures this note to Richard J. Collins, without recourse to me.
> Dated Dec. 2/10.
> Int. pd. to Jan. 10/09"

and at the right of the assignment appears the signature of E.B. Wade.

A photographic copy of the note shows the exact situation of the endorsements. The defendant insists that the signature of Wade was not to the assignment but simply to the statement that interest was paid to Jan. 10/09.

It is the contention of complainant that on account of the crowded condition by reason of the indorsements on the instrument, there was no room on the part of the note, where the assignment to him was written for the signature of Wade and that Wade wrote on the bottom of the next column and immediately opposite the written assignment his signature including the date to which the interest was paid.

When a signature is so placed upon an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser. Section 17, Sub.-Sec. 6,

The omission to [illegible]

the defendant and there [illegible]

ing the assignment of the note, [illegible]

prove the [illegible]

ment thereof [illegible] in the [illegible]

Fox River [illegible]

The right to the possession [illegible]

amendatory negotiable [illegible]

and in the absence of [illegible]

were delivered to [illegible]

of such paper were [illegible]

1Wa 111. 371-374.

There is no evi[illegible]

did not come into possession of the [illegible]

It is conceded that [illegible]

owner of the note [illegible]

the book [illegible]

"For a valuable [illegible]

& sell all my right, title and interest in and to [illegible]

note and the money [illegible]

Collins, without recourse to me.

Dated, [illegible] 2/10.

Int. pd. to Jan. 10/0[illegible]

and at the right [illegible]

A photo [illegible] copy of [illegible]

the endorse[illegible]

was not to the [illegible]

was paid to Jan. 10/0[illegible]

It is the contention of [illegible]

ed condition by reason of the [illegible]

was no room on the [illegible]

written for the [illegible]

of the next [illegible]

his signature [illegible]

[illegible]

not clear [illegible]

sign, he is to be [illegible]

Chapter 98 J. & A. Illinois Statutes, Par. 7656.

A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity. Sec. 63, Chap. 98, Par. 7702 J. & A. Illinois Statutes.

There is no question but that E. B. Wade, the assignee and legal holder and owner of said note, placed his name upon said note, and in doing so, it is clear that he did not do so either as maker, drawer or acceptor. Therefore, under said Sec. 63, he is deemed to be an indorser, and if such indorsement is in blank (having, as is claimed by the defendant no reference to the written assignment), then under the law, complainant, being in possession thereof, is the legal holder and owner of said note.

The complainant was not required to make proof of a consideration paid for the note and mortgage in order to make out a prima facie case. First National Bank of Princeton vs. Ficklin, supra.

It is insisted by the defendant that the Statute of Limitations has run against the note and mortgage and for that reason complainant is not entitled to a decree.

The question of the right of action of complainant being barred by the Statute of Limitations although pleaded was not passed upon by the master. It is quite evident that the question was not argued before the master as he made no finding thereon. The record fails to show that any objection was made by the defendant, to the report of the master on account of a failure to make a finding on the question of the statute running against the said note and mortgage.

Section 11, of the Limitation Act must be construed in connection with Sec. 16, applicable to promissory notes, and the mortgage will not be barred until the debt is barred. Kraft vs. Holzmann, 206 Ill. 548.

If the debt has been kept alive, the Statute of Limitations is no defense to the foreclosure. Metcalf vs. Metcalf, 219 Ill. App. 96-106.

[illegible]

[illegible]

than an [illegible]

be clearly [illegible]

in some [illegible]

[illegible] action.

There is no [illegible]

holder and [illegible]

doing so, [illegible]

or accepter. [illegible]

indorser, [illegible]

by the [illegible]

the law, [illegible]

or and owner [illegible].

The [illegible]

tion [illegible]

case. First National [illegible] action [illegible]

It is [illegible]

has run against [illegible]

is not [illegible] [illegible].

The [illegible] of the [illegible]

by the [illegible]

by the [illegible]

before [illegible]

show [illegible]

the [illegible]

of the [illegible]

[illegible]

tion [illegible]

will [illegible]

III. [illegible].

If [illegible]

[illegible] the [illegible]

[illegible].

The record discloses that on December 2, 1918, the defendant Harry E. Parker, Jr., in writing, indorsed on the note, made a new promise to pay the same and signed his name to the new promise so made in writing.

If any payment or new promise to pay shall have been made, in writing, on any bond, note, etc., or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay. Sec. 16, Chap. 83, Ill. Stat. J. & A. Par. 7211.

The above are the only material questions discussed by the defendant in opposition to the contention of the complainant.

Although the defendant Ogden made a claim in the court below of some interest in the real estate involved herein he has not seen fit to present any argument in support thereof in this court.

We have carefully examined the argument presented and the authorities cited and are of the opinion that the court erred in dismissing the original bill. The evidence discloses that the complainant made out a prima facie case, which has not been overcome.

The decree and order of the circuit court is reversed and the cause remanded with directions to the court to enter a decree in favor of Collins, the complainant, on the original bill.

Reversed and Remanded with Directions.

[illegible] defendant [illegible]

[illegible] promise [illegible] made in writing.

If any [illegible] writing, on [illegible] debtedness, [illegible] action may be [illegible] the time of [illegible] Stat. 1. [illegible] Sec. [illegible].

The [illegible] defendant [illegible]

Although [illegible] of some [illegible] fit to present [illegible]

[illegible] authorities [illegible] dismissing the original bill. [illegible] plaintiff made [illegible]

The decree [illegible] cause remanded [illegible] favor of [illegible] defendant, [illegible]

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion

of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this 25th day of Aug, in the year of our Lord one thousand nine hundred and twenty five

Justus L. Johnson
Clerk of the Appellate Court.

(59467—500-11-21)

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

240 I.A. 677

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7541

Hannah L. Erickson,
Plaintiff in error,
vs.
Equitable Life Assurance Society
of the United States, a corporation,
Defendant in error.

Error to the Circuit Court
of Rock Island County.

240 I.A. 677
Certiorari denied

Partlow, J.

Plaintiff in error, Hannah L. Erickson, began suit in the circuit court of Rock Island county against defendant in error, The Equitable Life Assurance Society of the United States, upon a contract or policy of insurance on the life of Hjalmar C. Erickson. Defendant in error filed the general issue and two special pleas. A general demurrer was overruled to the two special pleas. The general issue was subsequently withdrawn, plaintiff in error elected to stand by her demurrer, judgment was rendered against plaintiff in error, and a writ of error has been prosecuted from this court.

The amended declaration charged that on March 4, 1902, defendant in error delivered to Erickson a writing, commonly called an insurance contract, which was set out in haec verba. The material provisions of the contract are sections 3 and 9, and a clause was stamped on the contract by a rubber stamp and contained some written matter.

Section 3 is as follows: "Occupation, Residence and Travel. There are no restrictions under this contract upon travel, residence, occupation, military or naval service, excepting for one year from its date of issue, during which time travel or residence in Mexico, or the Torrid Zone, and engagement, occupation or employment in blasting, mining, submarine labor, aeronautic ascensions, the manufacture, handling or transportation of inflammable or explosive substances, service upon railroad trains, or in switching or coupling cars, or on any steamboat or vessel, will render this contract void, and excepting military or naval service in war, which is at all times subject to and permitted only in conformance with the provisions of section 4 below."

Hannah L. Erickson,

Plaintiff in error,

vs.

Equitable Life Assurance Society
of the United States, a corporation,

Defendant in error.

Partlow, J.

Plaintiff in error, Hannah L. Erickson, commenced in the
cuit court of Hoon Island county against defendant in error, The
Equitable Life Assurance Society of the United States, upon a con-
tract or policy of insurance on the life of Hjalmar L. Erickson.
Defendant in error filed the general issue and special pleas.
A general demurrer was sustained to the two special pleas.
general issue was subsequently withdrawn, whereupon [illegible]
to stand by her demurrer, [illegible]
error, and a writ of error has been prosecuted [illegible].

The amended declaration [illegible] in error, [illegible]
in error delivered [illegible]
contract, which was set out in haec verba. [illegible]
of the contract are [illegible] and 6, [illegible]
contract by a rider [illegible].

Section 5 [illegible] "[illegible]
are no restrictions [illegible] upon travel, [illegible]
tion, military or naval service, [illegible]
date of issue, [illegible]
the Torrid zone, [illegible]
mining, submarine [illegible]
handling or transportation of [illegible]
service upon railroad trains, or [illegible]
on any steamboat or vessel, [illegible]
certain military or naval service [illegible]
to and permitted only in [illegible]
& below."

Section 4 is quite lengthy and related to service in time of war, which we do not think material in the determination of the questions at issue.

Section 9 was as follows; "Incontestibility. - This contract shall be indisputable after one year from its date of issue for the amount due, provided the installments are duly paid."

The contract was signed at the bottom by the president. Then followed the clause which is in controversy in this case. This clause is stamped on the policy by a rubber stamp, with a blank space for certain writing, and for convenience we will refer to it as the rubber stamp clause. It is as follows: "It is hereby provided that railroad train service in any capacity, excepting round house work, will at all times render this contract null and void unless permission is first obtained from this society and the extra premium required is paid." And below are the initials - "W. A. R."

It appears from the declaration and from the application of Erickson that at the time the policy was issued, he was employed as a wiper in a round house.

The declaration further alleged that by said contract, in consideration of the payments by Erickson of $65.09, and a like sum on February 19 each year thereafter until February 19, 1922, defendant in error, upon surrender of the contract at that time if the same was then in force, promised to deliver to Erickson a twenty-five year 5% registered gold bond of said defendant in error for $1000., and in event of the death of Erickson within 20 years of the date of the contract, provided all the installments had been paid, any annual installment falling due after said death should be cancelled, and the contract should mature, and upon proof of death, the defendant in error was to deliver the gold bond, or in lieu thereof, pay the equivalent of said bond in cash to Augusta J. Peterson, the mother of Erickson, if living. If she was not living at that time the payment was to be to Erickson's executors, administrators or assigns. The cash value of the bond at the death of Erickson was to be $1300. It was further alleged that

Section 6 is quite lengthy and related to several [illegible],
which we do not think material in the examination of the [illegible]
issue.

Section 9 was as follows; "Loss of eligibility. - This contract shall
be indisputable after one year from its date [illegible] amount
due, provided the installments are duly paid."

The contract was signed at the [illegible] by the [illegible]. The following
lowed the clause which is in controversy in this case. This clause is
stamped on the policy by a rubber stamp, with a place [illegible] for certain
writing, and for convenience we will refer to it as the rubber stamp
clause. It is as follows: "It is hereby provided that [illegible] train
service in any capacity, excepting round house work, will [illegible] all times
render this contract null and void unless continuously in first obtained
from this society and the extra premium required is paid." Any [illegible]
are the initials - "W. S. B."

It appears from the deposition and from the [illegible] of
Erickson that at the time the policy was issued, he was employed as
a wiper in a round house.

The defendants further alleged that by [illegible] contract, in con-
sideration of the payments by Erickson of $[illegible], and a fine and on
February 19 each year thereafter until [illegible], [illegible]
error, upon surrender of the contract [illegible] in force, promised to deliver to Erickson [illegible] year [illegible]
tered gold bond of said defendant in error for [illegible], and in [illegible] of
the death of Erickson within 20 years of [illegible] contract, pro-
vided all the installments had [illegible], and [illegible] ing due after all [illegible] in accordance
mature, and upon proof of death, the [illegible] the gold bond, or in lieu thereof, [illegible] said [illegible]
cash to surrender. However, the [illegible] he was not living at that time the [illegible] excessive, [illegible]
the death of Erickson was [illegible] 1900. It [illegible]

Erickson, in his lifetime, paid all the amounts due, and performed all of the conditions of the contract; that he died on March 2, 1907, that plaintiff in error, who was his widow, made proof of death; that the contract was in full force and effect at the date of the death of Erickson and by means thereof defendant in error became liable to pay plaintiff in error the bond, or $1300. in lieu thereof, with interest at 5% per annum from May 1, 1907.

The second count of the declaration was the consolidated common counts.

The second special plea alleged that it was provided in the contract that the privileges and conditions stated on the second and seventh pages should form a part of the contract as fully as if recited at length over the signatures affixed; that on the seventh page was the rubber stamp clause with reference to extra premium in case of railroad service, as above set forth; that contrary to the provisions of the contract, and with full knowledge thereof, Erickson, during his lifetime, entered upon railroad train service in the capacity of a locomotive fireman; that he never obtained permission of defendant in error to enter upon any railroad train service other than round house work, in which he was engaged at the time the policy was issued; that he did not pay the extra premium as provided in said rubber stamp clause; that at the time of his death, he was engaged in railroad train service other than round house work; that by reason of his failure to comply with the provisions of said instrument, the contract became null and void.

The third plea was substantially the same as the second, except that it alleged that the rubber stamp clause was a special and additional provision and condition, written in different and distinct typewriting and handwriting from the remainder of the contract.

As ground for reversal it is urged that the court improperly overruled the demurrer to the special pleas. In support of this position, it is insisted by plaintiff in error that the instrument is, in fact, a policy of insurance and should be construed according to the rules

Hutchson, in his lifetime, paid all the [illegible] all of the conditions [illegible]; [illegible] that plaintiff in error, [illegible]; [illegible] the contract was in full force [illegible] Hutchson and by [illegible] plaintiff in error [illegible]. In the interest, [illegible] at 5% per annum from [illegible] 1, 1917.

The second count [illegible] counts.

The second [illegible] that it [illegible] seventh paragraph [illegible] at length over the [illegible] the rubber [illegible] railroad [illegible] of the contract [illegible] his lifetime, [illegible] a locomotive [illegible] in error to [illegible] work, in which [illegible] he did not [illegible] clause; [illegible] service other [illegible] comply with [illegible] null and void.

The third [illegible] that it [illegible] al protection [illegible] writing [illegible]

A demurrer [illegible] ruled the [illegible] it is insisted [illegible] a policy of [illegible]

of law applicable to policies of insurance; that, under section three there was no restriction upon travel, residence, or occupation, except for one year from the date of issue, during which time certain prohibited occupations and travel would render the contract void; that under section nine the contract was to be indisputable after one year from its date, and it was in force for over 5 years; that these two sections cannot be reconciled with the rubber stamp clause but they are in conflict with it; that a contract of forfeiture will be construed most strongly against the party claiming the forefeiture; that a clause which is in the nature of an exception to the liability of the insurer will also be construed most strongly against the company; that where there is a conflict in the provisions, favor should be given that construction which gives the greater indemnity; that the provision that railroad train service will at all times render the contract null and void, means railroad train service during the space of one year from the date of the policy but not after that time; that the pleas set out a good defense only in the event that defendant in error had no knowledge that the insured was engaged in a prohibited occupation; that the pleas do not deny that the installments mentioned in the contract were fully paid, but only that the insured did not pay the extra premium required as provided in the rubber stamp clause; that it is to be presumed that section three was to have some meaning; that it was placed in the contract as an inducement to the insured to purchase; that when a policy contains an indemnifying clause in case of death entitled "Occupation, Residence and Travel" in large letters, the company should clearly state therein all of the conditions and limitations which it desired to impose upon the three subjects embraced within the title; that it would not be expected that a man of the age of the insured, whose future occupation would likely be in railroad train service, would enter into a contract which would be void if he engaged in the occupation to which he would naturally be promoted. It is also contended that the pleas do not answer the declaration for the reason that they are silent as to when the assured entered the prohibited employment,

of law applicable to policies of insurance; that, under section three there was no restriction upon travel, residence, or occupation, except for one year from the date of issue, during which time certain prohibited occupations and travel would render the contract void; that under section nine the contract was to be indisputable after one year from its date, and it was in force for over 2 years; that these two sections cannot be reconciled with the rubber stamp clause but they are in conflict with it; that a contract of insurance will be construed most strongly against the party claiming the forfeiture; that a clause which is in the nature of an exception to the liability of the insurer will also be construed most strongly against the company; that where there is a conflict in the provisions, favor should be given that construction which gives the greater indemnity; that the provision that railroad train service will at all times render the contract null and void, means railroad train service during the space of one year from the date of the policy but not after that time; that the rubber stamp is a good defense only in the event that defendant in error had no knowledge that the insured was employed in a prohibited occupation; that the pleas do not deny that the installments mentioned in the contract were fully paid, but only that the insured did not pay the extra premium required as provided in the rubber stamp clause; that it is to be presumed that section three was to have some meaning; that it was placed in the contract as an inducement to the insured to purchase; that when a policy contains an indemnifying clause in case of death entitled "Occupation, Residence and Travel" in large letters, the company should clearly state therein all of the conditions and limitations which it desired to impose upon the rights assigned without the title; that it would not be expected that a man of the age of the insured, whose future occupation would likely be in railroad train service, would enter into a contract which would be void if he engaged in the occupation to which he would naturally be promoted. It is [illegible] that the pleas do not answer the declaration for the reason that they are silent as to when the assured entered the prohibited employment.

how long he continued therein, and whether this occupation was gainful or otherwise; that the pleas are silent as to whether the death of the insured was brought about by reason of the alleged prohibited occupation.

The original contract or policy has been certified to this court for our inspection, in order that we may more easily determine the effect to be given to the various provisions in controversy. It is apparent that the policy, before the rubber stamp clause was attached, was a form which was usually used be defendant in error. There can be no doubt that under section three, without the rubber stamp clause, it was the intention of this policy that there should be no restriction either as to residence, travel, or occupation, except for one year from the date of the policy. It is also apparent under section nine that the contract was to be indisputable after one year provided the premiums were paid. If this had been the policy issued there could be no question about this case, but this was not the policy issued. The policy issued was modified by the rubber stamp clause which did not prohibit Erickson from becoming a locomotive fireman, or from engaging in any other kind of railroad train service. The restriction was that, if he did engage in railroad train service other than round house work, he was to first obtain the consent of the defendant in error and pay the extra premium required or the policy was to be null and void. The plea avers that Erickson had full knowledge of the conditions of this policy, and that in violation of its provision, he became a locomotive fireman without obtaining the consent of the defendant in error and without paying the extra premium. The averments of the plea under the demurrer must be taken as true. It is not contended that the parties did not have the right to put this rubber stamp clause on the policy. If it was put on the policy with full knowledge of the parties it is binding and thereby limited the other provisions.

It is a well known rule of law that where a contract is partly written and partly printed and there is a conflict between the written and printed provisions that the written provisions will control and

how long be continued [illegible]
or otherwise; that the [illegible]
the insured was [illegible]
occupation.

The original [illegible]
for our inspection, [illegible]
effect to be given to [illegible]
apparent that the [illegible]
was a form which [illegible]
no doubt the under [illegible]
it was the intention [illegible]
either as to [illegible]
from the date of the [illegible]
that the contract was [illegible]
premiums were [illegible]
be no question about [illegible]
The policy issued [illegible]
not prohibit [illegible]
engaging in any other [illegible]
was that, [illegible]
house work, he was [illegible]
error and [illegible]
and void. [illegible]
ditions of the policy, [illegible]
became a locomotive [illegible]
tendant in error [illegible]
of the plea under [illegible]
tended that [illegible]
stand clause of the policy. [illegible]
knowledge of [illegible]
provisions.

It is [illegible]
written and verbally [illegible]
and varied conditions [illegible]

prevail, also that a special clause will control over a general clause. This is the rule, not only with reference to contracts in general but this rule also applies to policies of insurance. German Insurance Company vs. Churchill, 26 Ill. App. 206; Rose vs. Mutual Life Insurance Company, 144 Ill. App. 434; affirmed 240 Ill. 45; Morris & Company vs. Rhode Island Insurance Company, 181 Ill. App. 500; Sloan vs. Boston Insurance Company, 186 Ill. App. 81; Sloan vs. Queen Insurance Company 186 Ill. App. 82. Authorities might be cited from other jurisdictions which amply sustain this proposition. This policy was made out on a printed form with the exception of the rubber stamp clause and blanks were left to be filled in. It appears from the pleadings that the intention of the parties was that the provisions of section three with reference to being no limitation on occupation for the period of one year should be changed, limited and modified so as to provide that, in case the insured engaged in railroad train service, he should first get permission of the defendant in error and should pay an extra premium while so engaged. This modification was made by attaching the rubber stamp clause to the policy. If there is any conflict between the printed and written provisions, the latter will govern. This provision was valid and binding, and as it was not complied with, the facts set up in the plea constituted a good defense, and the court properly overruled the demurrer to the pleas.

We do not think it is necessary to consider in detail the other points urged. The question which we have already considered goes to the merits of the whole controversy. It is claimed, however, that the pleas are not sufficient for the reason that they do not allege that defendant in error did not know that the insured was engaged in railroad train service, and that if it did know that fact, it was a waiver. The question of waiver is one which has been before the courts of this state on many occasions. There has been some confusion in the decisions as to the necessity of alleging a waiver, but in the recent case of Feder vs. Midland Casualty Company, 216 Ill. 552, the question was finally settled, and it is held in that case that the person who wants

prevail, also that a special clause will [illegible]
This is the rule, not only [illegible]
this rule also applies [illegible] of [illegible]
Company vs. Thurmill, [illegible] Ill. Ann. 536; [illegible]
Company, 144 Ill. App. [illegible] Ill. 48; [illegible]
Rhode Island Insurance Company, [illegible] 600; Olson vs. [illegible]
Insurance Company, 186 Ill. App. [illegible]; Olson vs. [illegible]
186 Ill. App. 82. [illegible] which simply contain this provision. [illegible]
printed form with the exception of the rubber stamp [illegible]
were left to be filled in. It [illegible] from the [illegible]
tention of the parties [illegible]
reference to [illegible]
year should be [illegible]
in case the [illegible]
get permission of the [illegible]
while so [illegible]
stamp clause [illegible]
printed and [illegible]
was valid [illegible]
up in the [illegible]
ruled the [illegible]

We do not [illegible]
points [illegible]
the merits [illegible]
place are [illegible]
defendant [illegible]
road train [illegible]
The [illegible]
state or [illegible]
as to the [illegible]
Yeager vs. [illegible]
finally settled, and it is held in that [illegible]

to take advantage of a waiver must allege it in his pleadings. For that reason if the provisions of the rubber stamp clause were waived, the duty was upon the plaintiff in error to allege such waiver in her declaration and it was not the duty of defendant in error to allege it in the pleas.

It is also insisted that the pleas do not allege that the act of the insured in entering railroad train service in any way contributed to his death. It is sufficient answer to this contention to say that under the terms of the policy it was not necessary that there should be any such allegation in the plea. The rubber stamp section provided that the policy should be null and void if the insured engaged in railroad train service without the consent of the defendant in error and, therefore, it was not necessary to allege that his death was caused by such service. Mutual Protective League vs. Langsdorf, 126 Ill. App. 572.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

prevail, also that a special clause will control over [illegible]. This is the rule, not only with reference to [illegible] this rule also applies to policies of insurance. [illegible] Company vs. Thurelkill, 70 Ill. App. 436; [illegible] Company, 144 Ill. App. [illegible]; [illegible] Rhode Island Insurance Company, 31 Ill. App. 600; Olson vs. [illegible] Insurance Company, 186 Ill. App. 81; [illegible] 186 Ill. App. 82. [illegible] which amply sustain this proposition. [illegible] printed form with the exception of the number of days [illegible] were left to be filled in. It appears from the pleadings [illegible] tention of the parties was that the provisions of section three [illegible] reference to color or limitation of [illegible] year should be change[illegible] in case the insured [illegible] get permission of the [illegible] while so engaged. [illegible] stamp clause [illegible] printed and [illegible] was valid [illegible] up in the [illegible] ruled the [illegible].

We do not [illegible] points urged. [illegible] the merits [illegible] place are [illegible] defendant [illegible] road track [illegible] The question [illegible] state on [illegible] as to the [illegible] Feder vs. [illegible] finally settled, and it is [illegible]

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We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

to take advantage of a waiver must allege it in his pleadings. For that reason if the provisions of the policy upon which were waived, the duty was upon the plaintiff in error to allege such waiver in her declaration and it was not the duty of defendant in error to allege it in the plea.

It is also insisted that the plea do not allege that the insured in entering railroad train service in any way contributed to his death. It is sufficient answer to this contention to say that under the terms of the policy it is not made any that there should be any such alleration in the plea. The rubber stamp section provided that the policy should be null and void if the insured engaged in railroad train service without the consent of the defendant in error and, therefore, it was not necessary to allege that his death was caused by such service. Ottman Protective League vs. Langsdorf, 245 Ill. 1, p. 5%.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of Feb. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Patek Brothers, a corporation,

appellant,

vs.

Gossard Radio and Wire Company, formerly Ferro Manufacturing Company,

appellee.

Appeal from the County Court of Boone County.

240 I.A. 678

Partlow, J.

Appellant, Patek Brothers, a corporation, began suit before a justice of the peace in Boone county, against appellee, Gossard Radio and Wire Company, formerly, Ferro Manufacturing Company, upon two trade acceptances, one for $100.00 and the other for $200.00, given by Ferro Manufacturing Company, which company was later reorganized as Gossard Radio and Wire Company. From the judgment rendered by the justice of the peace an appeal was prosecuted to the county court of Boone county. There was a trial by jury, judgment in favor of appellant on the $100.00 trade acceptance only, and an appeal has been prosecuted to this court.

Appellant was in business in Milwaukee, Wisconsin. The place of business of appellee was in Belvidere, Illinois. John Pattera was doing business as the Clinton Cabinet Works, in Clinton, Wisconsin. Appellee entered into a contract with Pattera in which Pattera was to make for appellee certain radio cabinets. On August 1, 1923, appellee, under this contract, in the name of Ferro Manufacturing Company, gave to Pattera the two trade acceptances in this case, together with other similar instruments. In July, 1923, Pattera wanted to buy of appellant some vitrolite, which is heavy white glass used for table tops in restaurants. The amount of the purchase was $545.00. When Pattera went to see appellant about this purchase he was asked concerning his financial standing. He said he had done business with appellant years before, but there was no record thereof on the books of appellant. Appellant decided that Pattera was not financially responsible for the order and so informed him, and suggested that appellant would fill the

7500 October Term, 1 [illegible].

Peter Brothers, a corporation,

appellant,

vs.

Gossard Radio and Wire Company, formerly Ferro Manufacturing Company,

appellee.

Partlow, J.

Appellant, Peter [illegible], [illegible] justice of the peace in Boone county, [illegible] and Wire Company, formerly, Ferro [illegible] trade accounts, the [illegible] by Ferro Manufacturing Company, which [illegible] as Gossard Radio and Wire Company. [illegible] justice of the peace [illegible] Boone county. [illegible] lant on the [illegible] prosecuted to [illegible].

Appellant [illegible] of business of appellee was in [illegible] doing business as the [illegible] Appellee [illegible] make for [illegible] under this [illegible] to Peter [illegible] similar instruments. [illegible] some vitrolite, which is [illegible] restaurants. [illegible] went to see [illegible] financial condition. [illegible] before, but [illegible] Appellant [illegible] order and so [illegible] [illegible]

order C. O. D. or that Pattera could pay sixty-five per cent of the contract, or give security therefor. Several days later, during the first week in August, Pattera returned to the office of appellant and asked whether some trade acceptances would be taken as security for the contract. He said he had money coming from appellee, and that it was unable to pay at that time and had asked him to take the trade acceptances. Appellant agreed to take the trade acceptances, and Pattera turned them over to appellant to apply on the order he had placed with appellant. The acceptances were kept by appellant until about a month before they were due on November 1, 1923, when they were deposited for collection, but they were returned protested. Immediately upon being notified of the protest, appellant communicated by telephone with Turner, the president of appellee, who signed the trade acceptances. Appellant testified that Turner said the matter would be taken care of in a few days. Turner testified that it was likely he did have a conversation with appellant, but if he did he certainly would never have promised to pay appellant because appellee never got anything for the acceptances. Turner also testified that he did not know anything about these acceptances at the time he talked to appellant over the telephone, and supposed they were talking about something some other person had been buying. He also testified he did not know, at that time, who had these acceptances, he knew they had been originally issued to Pattera, but there was nothing said over the telephone that they were given by Ferro Manufacturing Company and signed by Turner as President. Immediately after this telephone conversation, appellant wrote to Turner and called his attention to the alleged promise over the telephone to pay. On November 26,1923, appellee wrote appellant a letter in which appellee stated that appellee had made a contract with Pattera for some radio cabinets, and had given him trade acceptances amounting to $500.00, to buy the material necessary to make the cabinets; that the order was partially delivered, and the remainder of it was undelivered, and for that reason appellee refused to pay the trade acceptances; that appellee was the debtor of Pattera for a very small amount. The acceptances were not

order C. T. M. of the [illegible] contract, or give according to [illegible]. [illegible] first week in August, [illegible] asked whether some [illegible] the contract. [illegible] was unable to [illegible] acceptance. [illegible] patterns [illegible] placed with [illegible] about a month [illegible] deposited [illegible] upon being [illegible] with Turner, [illegible] amount. [illegible] same of [illegible] have a conversation with [illegible] never have [illegible] thing for the [illegible] know anything [illegible] appellant [illegible] something [illegible] did not [illegible] had been [illegible] over the [illegible] and signed by Turner as [illegible] conversation, [illegible] the signed [illegible] appellee [illegible] appellee [illegible] and had [illegible] material necessary to [illegible] delivered, [illegible] appellee refused to pay the [illegible] letter of [illegible]

paid and this suit was commenced.

The contention of appellant is that the trade acceptances were negotiable instruments, were transferred for a valuable consideration, in due course of business, without notice of defects, and before maturity; that their introduction in evidence made a prima facie case, and therefore appellant was entitled to judgment for $300.00 on the two acceptances.

Section 1 of the Negotiable Instrument Act provides that any instrument payable in money, to be negotiable, must conform to the following requirements: 1, It must be in writing and signed by the maker or drawer. 2. Must contain an unconditional promise, or order, to pay a sum certain in money. 3. Must be payable on demand, or at a fixed or determinable future time. 4. Must be payable to the order of a specified person or to bearer. 5. Where the instrument is addressed to a drawee, he must be named, or otherwise indicated therein with reasonable certainty.

Section 25 defines value as any consideration sufficient to support a simple contract. An antecedent, or pre-existing claim, whether for money or not, constitutes value where an instrument is taken either in satisfaction thereof or as surety therefor, and is deemed such whether the instrument is payable on demand or at a future time. Section 26 provides that where value has at the time been given for the instrument, the holder is deemed a holder for value in respect to all parties who become such prior to that time. Section 28 provides that absence or failure of consideration is a matter of defense as against any person not a holder in due course. Section 31 provides that the indorsement must be in writing on the instrument itself, or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement. Section 45 provides that except where an instrument bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue.

Section 52 provides that a holder in due course is a holder who

peal and this suit was commenced.

The construction of respondent [illegible] negotiable instruments, were [illegible] in due course of business, [illegible] ity; that their introduction [illegible] therefore appellant was entitled [illegible] acceptances.

Section 1 of the Uniform [illegible] instrument payable in money, [illegible] following requirements: 1. It must be [illegible] maker or drawer. 2. Must contain an unconditional [illegible] to pay a sum certain in money. 3. [illegible] a fixed or determinable future time. 4. [illegible] of a specified person or to bearer. 5. [illegible] addressed to a drawee, must be [illegible] with reasons in court only.

Section 28 defines value [illegible] support a simple contract. [illegible] whether for money or not, constitutes [illegible] taken either in satisfaction thereof [illegible] deemed such whether the instrument [illegible] future time. Section 29 provides [illegible] been given for the [illegible] value in respect to all [illegible] Section 29 provides [illegible] matter of defense [illegible] Section 31 provides [illegible] instrument itself, or upon a separate [illegible] the indorser, without additional [illegible] Section 49 provides that except [illegible] the maturity of the instrument, every [illegible] facts to have been effected [illegible]

Section 52 provides that a holder [illegible]

has taken the instrument under the following conditions: 1. That the instrument is complete and regular upon its face. 2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact. 3. That he took it in good faith and for value. 4. That at the time it was negotiated to him he had no notice of any informality in the instrument, or defect in the title of the person negotiating it.

These various sections of the statute are the law relative to the facts in this case and they are amply sustained by many decisions. Each of the instruments in question conformed in every respect to the above statutory provisions. Each was dated at Clinton, Wisconsin, August 1, 1923; that city was specifically named as the address of the drawer; the Ferro Manufacturing Company was specifically stated in each to be the name of the drawee, and Belvidere, Illinois, was specifically given as the address of the drawee. There was a specific agreement, in the $100.00 acceptance, to pay that amount to the order of the Clinton Cabinet Works, on November 1, 1923. The $200.00 acceptance agrees to pay $200.00 to the order of "ourselves" on November 1, 1923. Each recited that the obligation of the acceptor arise out of the purchase of goods from the drawer. The interest was six per cent. Each was signed by Clinton Cabinet Works, by John Pattera, President, as the drawer. The acceptances were dated at Belvidere, Illinois, August 1, 1923, and were signed by Ferro Manufacturing Company, by C. H. Turner, who was specifically named as the acceptor. Each was indorsed on the back by the Clinton Cabinet Works, by John Pattera, President.

Appellee insists that on account of the acceptance for $200.00 being payable to "ourselves", that it was, in fact, payable to appellee, and not to the Clinton Cabinet Works, and as it was not indorsed by appellee that appellant had no title to it, and was not entitled to recover upon it. There is no merit in this contention. As above stated each instrument specifically states the name of the drawer and the drawee, and gives the address of each. The Clinton Cabinet Works

[illegible] the instrument under the [illegible] instrument is complete [illegible] the holder of it before it was [illegible] has been previously stolen [illegible] it in good faith [illegible] to him be in [illegible] in the title of the [illegible]

These various questions [illegible] facts in this case [illegible] Each of the [illegible] above statutes [illegible] August 1, 1924; [illegible] the drawer; [illegible] in each to be the [illegible] specifically [illegible] agreement, in the $100.00 [illegible] of the Clifton [illegible] ance agreed to pay $ 100.00 [illegible] 1925. Each [illegible] the purchase of [illegible] Each was signed by Clinton [illegible] as the drawer. [illegible] August 1, 1924, [illegible] C. H. Turner, [illegible] indorsed on the back [illegible] President.

Appellee in [illegible] suing [illegible] being sued to "[illegible]", [illegible] and not to the [illegible] appellee [illegible] recover upon it. [illegible] stated such instrument would still [illegible] the drawer, and hence the [illegible]

was the drawer and the word "ourselves" refers to the drawer, Clinton Cabinet Works. It was not only payable to the Clinton Cabinet Works but was so indorsed, and the title vested in appellant.

The acceptances were negotiable instruments, transferable by indorsement, and the undisputed evidence is that they were transferred to appellant before maturity, therefore, appellant was a holder for value, before maturity, and was entitled to payment unless there was evidence of notice to appellant before the transfer, of a failure of consideration in whole or in part. In support of the contention that appellant was a holder with notice, appellee contends that at the time of the transfer to appellant, that Pattera told appellant that he could not collect the acceptances from appellee. The evidence does not sustain this contention, but on the contrary is that Pattera told appellant at the time of the transfer, that he had money coming from appellee which it could not pay him at that time, and that he had been asked to take trade acceptances in part payment. This evidence falls far short of being sufficient to charge appellant with notice that there was a defense against the instruments on the ground that there was a failure of consideration. With the evidence in this condition the court permitted appellee to prove the facts which constituted the failure of consideration. Appellant objected to the evidence, and moved to exclude it. The court did not rule upon the objection at the time it was made, but stated that appellee would have to prove notice, or the evidence would be excluded. No evidence of notice was offered by appellee, the court failed to exclude the evidence, and it was considered by the jury. This was error. All of the evidence relative to a failure of consideration should have been excluded, for the reason that appellant had no notice of such defect until after November 26, 1923, which was after the instruments were due, and long after they became the property of appellant. If this evidence had been excluded there would have been no defense to the instruments and appellant would have been entitled to judgment for $300.00. Clark vs. Newton, 235 Ill. 530.

was the lower end [illegible]
Cabinet [illegible]
but was so [illegible]

The accept [illegible]
forsaken, [illegible]
to appellant [illegible]
value, before [illegible]
evidence of [illegible]
consideration [illegible]
appellant was [illegible]
of the transfer [illegible]
not collect the [illegible]
tain this contention, [illegible]
at the time of the transfer, [illegible]
which it could not pay him at that time, [illegible]
to take trade [illegible]
short of being [illegible]
was a defense [illegible]
failure of [illegible]
court [illegible]
failure of [illegible]
moved to [illegible]
time it [illegible]
or the [illegible]
by [illegible]
considered [illegible]
to a failure [illegible]
that [illegible]
1922, [illegible]
became the [illegible]
there [illegible]
[illegible]

[illegible] Ill. App.

Appellee contends that appellant cannot maintain this suit for the reason that it began a suit in Wisconsin against Pattera, and recovered a judgment for the total amount due appellant from Pattera, that by that act appellant elected its remedy, and waived its cause of action against appellee. There are several answers to this contention, but one of them will be sufficient. There is no competent evidence of a suit in Wisconsin, or a judgment against Pattera for the amount due. Appellant offered in evidence the deposition of Arthur L. Kohlmetz, the credit manager and assistant secretary of appellant. He testified to the facts relative to the contract with Pattera, and the transfer of the instruments in question from Pattera to appellant. He did not testify with reference to any suit or judgment in Wisconsin against Pattera. On cross-examination, over the objection of appellant, he testified with reference to the Wisconsin suit. The objection to this evidence was renewed when the depositions were read on the trial but the objection was overruled by the court. This evidence was not proper cross-examination. The objection to it should have been sustained and the evidence excluded. No evidence was offered by appellee on this question, therefore, there was no competent evidence to sustain the contention by appellee with reference to the Wisconsin suit and it cannot be considered in this case.

The judgment will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of Feb. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

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abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

240 I.A. 678

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On 1925 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Joseph Adelman,

appellee,

vs.

Illinois Central Railroad Company,

appellant.

Appeal from the Circuit Court of Kankakee County.

Partlow, J.

Appellee, Joseph Adelman, obtained a judgment for $226.30, in the circuit court of Kankakee county, against appellant, Illinois Central Railroad Company, for injuries to his automobile, and an appeal has been prosecuted to this court.

The only grounds for a reversal are that appellant was not guilty of the negligence charged, and that appellee was not in the exercise of ordinary care for his own safety but was guilty of contributory negligence.

The first count of the declaration charged general negligence. The second count was dismissed. The third count set up an ordinance of the city of Kankakee which provided that "every locomotive engine, car, or train of cars, running in the nighttime on any railroad tracks in the city, shall have and keep a bright and conspicuous light at the forward end of such locomotive engine, car, or train of cars. If such engine, or train, be backing, it shall have a conspicuous light at the rear of the engine, or train, so as to show the direction in which the same is moving," and alleged a violation of this ordinance. The fourth count charged the failure to have a flagman at the crossing.

The evidence shows that Hickory street, in the city of Kankakee, extends east and west, and is about two blocks south of the station of appellant. The railroad extends north and south across Hickory street and consists of ten tracks, on a right of way two hundred feet wide. The surface of the street across the right of way is about five feet higher than the rest of the street. The first north and south street east of the tracks is East Avenue, and the first

Joseph Adelman,

appellee,

vs.

Illinois Central Railroad

Company,

appellant.

Appeal from the circuit court

of Cook county.

Partlow, J.

Appellee, Joseph Adelman, obtained a judgment for $25,000, in the circuit court of Cook county, against appellant, Illinois Central Railroad Company, for injuries to his automobile, and an appeal has been prosecuted to this court.

The only grounds for a reversal are that appellant was not guilty of the negligence charged, and that appellee was not in the exercise of ordinary care for his own safety but was guilty of contributory negligence.

The first count of the declaration charges several negligences. The second count was dismissed. The third count set up an ordinance of the city of Kankakee which provided that every locomotive engine, car, or train of cars, running in the nighttime on any railroad tracks in the city, shall have and keep a bright and conspicuous light at the forward end of such locomotive engine, car, or train of cars. If such engine, or train, or portion, it shall have a conspicuous light at the rear of the engine, or train, so as to show in direction in which the same is moving," and alleged a violation of this ordinance. The fourth count charged the failure to have a flagman at the crossing.

The evidence shows that Hickory street, in the city of Kankakee, extends east and west, and is about two blocks south of the station of appellant. The railroad extends across the south across Hickory street and consists of ten tracks, on a right of way two hundred feet wide. The surface of the street across the right of way is about five feet higher than the rest of the street. The first north and south street east of the tracks is East Court, and the first

north and south street west of the tracks is West Avenue. About ~~[illegible]~~ 10:30 P. M. on December 31, 1923, appellee, a young lady cousin of appellee, and Morris Jaffe, started east in appellee's automobile from a house on West Hickory street about two hundred feet west of the right of way. Jaffe sat in the front seat with appellee. A train, consisting of an engine headed north, with seven cars behind it, and three cars ahead of it, was being backed south across Hickory street, on what was known as the scale track, which was the fifth track from the west side of the right of way. The weather was clear and cold, and there were street lights on the street intersections.

Appellee testified that as he approached the crossing, he was traveling five or six miles per hour. He heard no bell or whistle. He looked, as he approached the crossing, and saw that the way was clear. He could see across the crossing on either side and could not see anything or anybody except a car which was standing on the track, which track he testified, was immediately west of the track upon which the collision occurred, and that the car was immediately north of the north line of Hickory street. There is some conflict in the evidence as to just where this car was standing. Appellant claims that it stood on the track farthest west, ninety-one feet from the track where the collision occurred, and about ten or twenty feet north of the north line of Hickory street, and that there were no other cars on the other tracks west of the scale track for a distance of at least one hundred and twenty feet north of the sidewalk on the north side of Hickory street. Appellee testified that he ascended the grade to the right of way, and when he got on the track where the car was standing, he suddenly saw the end of the train in front of him. He turned his automobile to the right and attempted to parallel the track, but the step on the first car caught the fender of the automobile and caused the damage. He testified there was no light on the head end of the car which struck the automobile, and that there was nobody on the track; that the train was traveling five or

north and south street west of the [illegible]
[illegible] 10:00 P. M. [illegible]
consist of a yellow, [illegible]
automobile [illegible]
feet west of [illegible]
appellee. [illegible]
were behind [illegible]
across Block street, [illegible]
was the first [illegible]
weather was clear [illegible]
street intersection.

Appellee [illegible]
travelling [illegible]
he looked, [illegible]
clear. He [illegible]
not see anything [illegible]
track, [illegible]
upon which [illegible]
north of the [illegible]
in the [illegible]
claims that it stood [illegible]
from the [illegible]
feet north [illegible]
no other [illegible]
distance [illegible]
walk on [illegible]
accident [illegible]
where [illegible]
from [illegible]
to parallel [illegible]
of the [illegible]
light [illegible]
there was nobody on the [illegible]

six miles per hour.

Jaffe testified that they looked closely both ways to see if anything was coming as they approached the crossing. The road was clear. He did not notice the train until they were five feet from the car which struck the automobile. There was no light on that car. Before they were struck he saw nobody on the car. He heard no alarm of any kind; that they had crossed one or two tracks before the collision; that he was not sure whether the automobile was running in high or not; that there was a freight car north of the crossing on the first track. It was fifteen or twenty feet north of Hickory street, near West Avenue, and that it was only a few feet from the track where the car stood to the track where they were struck by the train.

J. E. Senesac, a brakeman on the train, testified that as the train approached Hickory street, he was riding on the south end of the front car and had a lighted lantern in his hand; that he had his feet in the stirrup which was on the south end of the car on the east side. When the train was about one hundred twenty feet from Hickory street he saw the automobile. He held his lantern out and gave the engineer a sign to slow down. The train slowed down a little and he noticed that the automobile kept coming right on. He stuck his lantern on the south end of the car facing south but the automobile made no effort to stop. The automobile was in the middle of Hickory street, and was fourteen to twenty feet away, when he saw that a collision could not be avoided, and he gave a sign to the engineer, who applied the emergency, and the train was stopped in about twenty feet; that the automobile was going twelve to fifteen miles per hour, and the train was going about five miles per hour. He testified the automobile struck the south car of the train about three feet from the south end, and the front fender was caught beneath the bottom of the car.

The foreman of the train crew, testified that Senesac was riding on the south end on the east side of the car with a lighted lantern in his hand. He saw Senesac give the sign to slow up a little.

six miles per hour.

Traffic regulation and the [illegible]

anything [illegible]

clear. He did not notice [illegible]

the car [illegible]

Before they were aware [illegible]

of any kind; that [illegible]

collision; that [illegible]

in high or [illegible]

on the first track. [illegible]

street, near [illegible]

track where [illegible]

the train.

[illegible]

train approached [illegible]

the front car [illegible]

feet in the [illegible]

east side. [illegible]

history [illegible]

gave the car [illegible]

little [illegible]

stuck his [illegible]

automobile [illegible]

of Hickor[illegible]

that a collision [illegible]

engineer, [illegible]

about twenty feet; [illegible]

miles [illegible]

He testified [illegible]

three feet [illegible]

north [illegible]

The [illegible]

on the [illegible]

in his hand. [illegible]

Senesac gave a wide stop sign which Fennell relayed to the engineer and the train was stopped.

The case was apparently tried upon the first and the third counts of the declaration which charged general negligence and the violation of the ordinance with reference to a light on the end of the car. On these questions there was a sharp conflict in the evidence. The witnesses for appellant testified that there was a light and that a signal was given. The witnesses for appellee testified there was no light and no signals were given. Under this condition of the evidence it was purely a question for the jury to say whether the appellant was guilty of the negligence charged in the first or third counts. The verdict of the jury on those questions is binding upon this court unless we can say that it is manifestly against the weight of the evidence which we do not feel justified in doing.

The other question was whether appellee was in the exercise of due care for the safety of his automobile, or whether he was guilty of contributory negligence. The contention of appellant is that there was plenty of light on the crossing, and that all appellee had to do was to look and listen and he would have seen the train. There was a car located so that it partially, at least, obstructed the view of appellee up the track to the north. There was a dispute as to just where this car was located, but if the evidence on behalf of appellee is to be believed, it was in such a position that it obstructed the view of appellee until the train came out from behind the car, and then he did not have time to stop. It is also claimed by appellant that there was some evidence that appellee was under the influence of intoxicating liquor, and he was not exercising due care for his own safety. One witness testified that he smelled liquor upon appellee's breath just after the accident. Other witnesses called by appellee, testified that they had been with him for some time prior to the accident, and that he had not been drinking. Appellee testified he had not taken any intoxicating liquor during

Sonesso gave a wide [illegible] and the train was stopped.

The case was [illegible] counts of the [illegible] violation of the [illegible] the car. On these [illegible] evidence. [illegible] light and that [illegible] filed there [illegible] tion of the [illegible] whether the [illegible] first or third [illegible] is binding [illegible] against the [illegible] in doing.

The other [illegible] due care for the safety of the [illegible] of contributory negligence. [illegible] there was [illegible] had to do [illegible] There was [illegible] the view of [illegible] as to just [illegible] of appellee [illegible] obstructed [illegible] the car, and [illegible] by appellant [illegible] the injuries of [illegible] case for his own [illegible] liquor [illegible] reason called [illegible] for some time [illegible] appellee testified he did not [illegible]

that day. What we have said with reference to the proof of the negligence charged in the declaration is also applicable to the question as to whether appellee was in the exercise of due care for his own safety. It was a question for the jury. There was evidence of due care, and we do not feel justified in saying that the finding of the jury on that point was manifestly against the weight of the evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

that day. That we have dealt with reference to the proof of the negligence charged in the declaration is also applicable to the question as to whether apollis was in the exercise of due care for his own safety. It was a question for the jury. There was evidence of due care, and we do not feel justified in saying that the finding of the jury on that point was manifestly against the weight of the evidence.

We find no reversible error in the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
SECOND DISTRICT.

in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court at Ottawa, this 9th day of Feb., in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

240 I.A. 678

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On DEC [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

I. H. Burnstine and Isadore Burnstine, doing business as Riviera Motor Sales,

appellants,

vs.

James Mack, Sheriff,

appellee.

Appeal from the Circuit Court of Grundy County.

240 I.A. 678

Partlow, J.

Appellants, I. H. Burnstine and Isadore Burnstine, doing business as Riviera Motor Sales, began an action of replevin in the circuit court of Grundy county against appellee, James Mack, sheriff of Grundy county, to recover possession of a Chrysler automobile. Two pleas were filed. The first alleged that the property was taken by the sheriff under a writ of execution in favor of Firestone Tire & Rubber Company and against W. B. Erickson, and at the time of the levy the property belonged to W. B. Erickson and not to the plain tiffs. The second alleged that the property, at the time of the levy, was the property of a third party, to-wit, W. B. Erickson, and not the property of the plaintiffs. A jury was waived and the cause was submitted to the court for trial. The court found the right of possession was in appellee, and entered an order retorno habendo. From this judgment an appeal was prosecuted.

On September 11, 1922, the Firestone Tire & Rubber Company obtained a judgment in the circuit court of Grundy county against W. B. Erickson for $818.51, and costs. On August 14, 1924, an execution was issued and delivered to the sheriff of Grundy county and served on Erickson on August 15, 1924. W. B. Erickson was thirty-nine years old and had lived at Morris, in Grundy county, all of his life. His father and brother owned a dry goods store which was operated under the name of Erickson Dry Goods Company. The father or brother, or both, owned a Jewett automobile. On August 19, 1924, W. B. Erickson drove the Jewett automobile to the place of business of appellants in Chicago and opened negotiations for the exchange of the Jewett car

I. R. Burnsides and Andore
Burnsides, doing business as
Riviere Motor Sales,

appellants,

vs.

James Dean, Sheriff,

appellee.

Partlow, J.

Appellants, I. R. Burnsides and Andore [illegible], doing business as Riviere Motor Sales, [illegible] an action of [illegible] in the circuit court of Hardy County against [illegible], sheriff of Hardy County, to recover possession of [illegible] automobile. [illegible] were filed. [illegible] sheriff under a writ of [illegible] of Firestone Tire & Rubber Company and against [illegible] property delivered to [illegible] second alleged that the property [illegible] property of a third party, [illegible] party of the plaintiffs. [illegible] mitted to the court for trial. [illegible] was in appellee, [illegible] judgment on general and [illegible].

On September 11, 1900, the [illegible] tained a judgment in the circuit [illegible] Erickson for $[illegible], and costs. [illegible] issued and delivered to the [illegible] Erickson [illegible] old and [illegible] father and brother [illegible] the name of Erickson [illegible] bata, owned a Jeffery automobile. [illegible] drove the Jeffery automobile to a [illegible] Chicago [illegible] the [illegible]

for the Chrysler car in question. The evidence on behalf of appellants shows that W. B. Erickson told appellants that he was the owner of the Erickson Dry Goods Company; that he was rated in Dunn & Bradstreet at $50,000, as a company, and his net worth was $60,000; that he had never been sued; that his monthly income was $300.00 and his yearly income $4000.00; that he had household goods of the value of $5000.00. A written statement of these financial facts was made by W. B. Erickson. The trade was made and a note for $912.65 was executed by W. B. Erickson to appellants, payable $150.00 each month for five months, and $162.50 on the sixth month after date. The Chrysler car was delivered to W. B. Erickson and the Jewett car was delivered to appellants. On August 25, 1924, the execution in favor of Firestone Tire & Rubber Company was levied on the Chrysler car by appellee, as the property of W. B. Erickson and it was advertised for sale. Upon being notified of the levy, appellants had a conversation over the telephone with W. B. Erickson, or his attorney. Later W. B. Erickson went to Chicago and had a conference with appellants. The appellants sent their attorney to Morris and had several conferences with W. B. Erickson and his father and brother. It is contended by appellants that in these various conversations it was agreed to rescind the contract. Appellant was to tender back to W. B. Erickson and his father and brother, the mortgage, the Jewett car, and all payments that had been made thereon and adjust all financial differences between them; that appellants told W. B. Erickson to return the Chrysler car, and he replied that he could not do so as it was in the hands of the sheriff and he had no funds to pay the execution and no other property on which execution could be levied. It also appears that appellants insisted that they should be given a bill of sale for the Jewett car, and they agreed to sell it and adjust the financial differences, and as a result of that agreement a bill of sale was executed by A. E. Erickson, the brother of W. B. Erickson. The exact date of this bill of sale does not appear from the abstract but it was evidently late in October. On September 3, 1924, $150.00 of the principal and $5.51 interest, was paid and endorsed on the note

of W. B. Erickson. On September 22, 1924, another 150.00 was paid, together with $4.44 interest, which was endorsed upon the note. After demand was made upon appellee for the possession of the Chrysler car the writ of replevin in this case was sued out, the car was delivered to appellants, and they took it to Chicago and sold it.

It is contended by appellants that the judgment should be reversed for the reason that after they learned of the fraud, they immediately rescinded the sale, tendered back the property which they had received as the result of the trade, and were therefore entitled to the return of the Chrysler car. It is contended by appellee that the facts in evidence do not sustain this contention.

There are two reasons why this judgment must be affirmed. Rule 16 of this court provides the manner in which abstracts of record shall be prepared. It provides that every error urged shall appear from the abstract so that this court can from the abstract determine all questions in controversy without being compelled to examine the record or bill of exceptions. This rule has not been complied with in this case. The abstract merely refers by title to the affidavit for replevin, the bond, writ of replevin, declaration, pleas, and finding and judgment of the court. None of these pleadings are abstracted and it is impossible from the abstract to determine the questions at issue in this case. Appellee has filed an additional abstract which sets out the declaration, the pleas, and certain parts of the evidence which were omitted from the abstract of the bill of exceptions. The abstract also fails to show that any exception was taken to the finding and judgment of the court, or that any appeal was prayed or allowed, or that any appeal bond was fixed or approved, or that any bill of exceptions was ordered within a definite time. If there was no exception to the judgment, and no appeal was prayed or allowed, it certainly cannot be contended that the questions raised by appellants upon this appeal are properly before this court. On account of the imperfect condition of the abstract we are justified in affirming this judgment without considering the questions raised.

of [illegible]

[illegible]

demurrer [illegible]

the writ of [illegible]

to appeal [illegible]

It is contended [illegible]

for the reason [illegible]

reasoned [illegible]

as the result of [illegible]

of the charge [illegible]

evidence do not [illegible]

There are two [illegible]

of this court [illegible]

be preferred. [illegible]

abstract [illegible]

in controversy [illegible]

of exception [illegible]

abstract [illegible]

writ of [illegible]

court. [illegible]

from the [illegible]

Appellee has [illegible]

the place, [illegible]

the abstract [illegible]

show that [illegible]

court, [illegible]

was fixed [illegible]

a definite [illegible]

appeal [illegible]

the question [illegible]

this court. [illegible]

are justified [illegible]

raised.

Even if the abstract did show that the case was properly before this court, and showed all of the pleadings and all of the errors urged, we do not think appellants made out such a case as entitled them to the possession of the Chrysler car. It is apparent from the evidence that W. B. Erickson was guilty of gross fraud and misrepresentation with reference to his financial condition and the ownership of the Jewett car at the time this exchange was made. His misrepresentations were sufficient to justify appellants in rescinding the sale on the ground of fraud. Under the evidence presented appellants, on discovering the fraud, had a right to rescind the contract, tender back all of the property received by them, demand possession of the property delivered by them, provided they did so promptly and the rescision was complete in all respects. Buchenau v. Horney, 12 Ill. 336; Naugle v. Yerkes, 187 Ill. 358; Doane v. Lockwood, 115 Ill. 490.

While the evidence on behalf of appellants tends to show that they did rescind the contract promptly, tendered back all of the property received by them, and demanded the Chrysler car, we do not think it is sufficient to show that the rescision was promptly, fully, or completely made. The levy was made on the Chrysler car on August 25, 1924. Within a day or two after the levy, appellants learned of the levy and on September 3, sued out the writ of replevin. They certainly did not repudiate the contract and tender back the Jewett car and all property received by them prior to that time for the reason that the note given to them by W. B. Erickson shows that the same day the writ of replevin was sued out that $150.00 of principal, and $5.51 of interest was paid upon this note, and again on September 22, 1924, $150.00 of principal, and $4.44 of interest was paid upon the note. The evidence does not show that these amounts were ever paid by appellants to Erickson or even tendered. The payment of this principal and interest was entirely contrary to the theory that the contract had been rescinded and the property turned back or tendered back. Not only does the evidence show that there were payments upon the note but it shows that long after the suit was brought

Even if the contract did not, [illegible]
this court, and showed all of the [illegible]
urged, we do not think [illegible]
them to the possession of the [illegible]
the evidence that [illegible] was [illegible]
representation with reference to his financial condition and the
ownership of the Jewett car [illegible]
misrepresentations were sufficient to [illegible]
ing the sale on the ground of fraud. [illegible]
appellants, on discovering the [illegible]
contract, tender back all of the property received [illegible]
possession of the property delivered by the [illegible]
promptly and the rescission was complete in all respects. [illegible]
v. Horney, 12 Ill. 448; Langley v. Warren, 147 Ill. 148; [illegible] v.
Lockwood, 115 Ill. [illegible].

While the evidence [illegible]
they did receive the [illegible]
property received by them [illegible]
think it is sufficient to [illegible]
fully, or completely made. [illegible]
August 21, 1921. [illegible]
learned of the law and [illegible]
They certainly did not [illegible]
Jewett car and all [illegible]
the reason that the [illegible]
the same by the [illegible]
principal, and [illegible]
on September [illegible]
was paid upon the note. [illegible]
were evidently [illegible]
of this [illegible]
that the contract was [illegible]
tendered back. Not only [illegible]
monts upon the note but it [illegible]

a bill of sale was executed by the brother of L. B. Erickson to appellants for the Jewett car, which was retained by appellants and never was delivered in rescision of the contract. It is true that appellants and Erickson could mutually agree to rescind and make whatever agreement they saw fit with reference to the return of the property but they could only rescind by tendering back the property fully and completely within apt time. The intention to rescind may be shown not only by what was said by the parties, but also by their acts. Sometimes the acts speak louder than the words. They said they rescinded, but their acts strongly tended to show that they did not in fact rescind to the extent which the law requires. This case presents several features which tend to show that appellants not only sought to retain the property received by them but they also sought to secure the possession of the Chrysler car. They were not entitled to do both. The trial court was in a better position to determine this question than this court is and we are impressed that this was the view which the trial court took of the matter. The judgment was not contrary to the weight of the evidence and should not be reversed unless it is contrary to the weight of the evidence.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

a bill of sale was executed by the brother of [illegible]
ianta for the lower car, which [illegible]
was delivered in possession of [illegible]
and Dickson could [illegible]
they saw fit with reference to the [illegible]
could only receive by telegraph [illegible]
within six time. The intention to receive [illegible]
was said by the vendee, and also by [illegible]
speak louder than the words. They [illegible]
acts strongly tended to show that [illegible]
extent which the law requires. [illegible]
which tend to show that [illegible]
party received by them but they also [illegible]
of the Chrysler car. They were not [illegible]
court was in a better position to [illegible]
court is and we are increased [illegible]
court took of the matter. [illegible]
of the evidence [illegible]
the weight of the [illegible]

We find no reason to [illegible]

[illegible]

STATE OF ILLINOIS, SECOND DISTRICT. } ss. I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of Feb. in the year of our Lord one thousand nine hundred and twenty-six,

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

7545 October Term, A.D. 1925. Agenda 27.

Reo Motor Car Company of
Chicago, a corporation,
appellee,

vs.

F. E. Jones,
appellant.

Appeal from the Circuit Court
of Winnebago County.

240 I.A. 678

Jett, J.

In this case the record discloses that the Reo Motor Car Company of Chicago, a corporation, appellee, took a judgment by confession against F. E. Jones, appellant, on a certain promissory note for the sum of $194.98. A motion was made by appellant to open up the judgment and for leave to plead which said motion was, by the court, denied and this appeal is prosecuted.

It appears that the note in question was given by appellant to secure the payment of a part of the purchase price of three motor trucks which appellant purchased from appellee. The purchase was evidenced by written orders for the trucks executed by the parties April 19, 1923. Two of the trucks were to be delivered on or about April 23, 1923 and the third truck was to be delivered in August 1923. Appellee allowed appellant a credit of $1500.00 for a used truck delivered to it and took his notes with warrants of attorney to confess judgments attached for the balance which included the note in question. It appears that the $1500.00 credit was divided and applied to all three of the trucks; $625.00 each or $1250.00 on the two delivered at the time of giving the notes and $250.00 on the third which was to be delivered in August, 1923. Two trucks were delivered in accordance with the order and the notes paid. It is claimed by appellant that the other truck was not delivered and for this reason he refuses to pay the note in question.

~~Thexxx~~

The original affidavit filed by the appellant in support of his motion to vacate the judgment and for leave to plead alleges that he purchased, on April 19, 1923 from the plaintiff, (appellee here) three certain motor trucks; that plaintiff agreed in writing to accept payment

Vol. 5 October Ter., ... Term.

Reo Motor Car Company of
Chicago, a corporation,
appellee,

vs.

F. E. Jones,
appellant.

240 Ill. 676

Ott, J.

In this case the trial court [illegible]
of Chicago, a corporation, [illegible]
against F. E. Jones, appellant, [illegible]
sum of $194.98. A motion [illegible]
and for leave to file said motion [illegible]
this appeal is prosecuted.

It appears that the [illegible]
secure the payment of a part of the purchase price [illegible]
which appellant received from appellee. [illegible]
by written orders [illegible]
Two of the trucks were [illegible]
the third truck was to be [illegible]
appellant a credit of $1500.00 [illegible]
his notes with [illegible]
the balance [illegible]
$1500.00 credit was [illegible]
$626.00 each or $1250.00 [illegible]
notes and $2[illegible].00 on the third [illegible]
1922. Two trucks were delivered in [illegible]
notes paid. [illegible]
delivered and for this [illegible]

Thereon

[illegible] The original [illegible] filed [illegible]
motion to vacate [illegible]
overruled, on April 12, 1926, from [illegible]
certain motor trucks; that plaintiff [illegible]

for the same by allowing for a used car delivered by the defendant to the plaintiff $1500.00, and defendant's promissory notes for the balance; that said $1500.00 credit for the used car was to be applied as follows: $625.00 on each of two said certain trucks and $250.00 on the other of said motor trucks; that thereafter in pursuance of said agreement the plaintiff delivered to the defendant the two certain motor trucks on which $625.00 each was allowed but has never delivered to the defendant the third motor truck upon which $250.00 was to be applied though often requested to do so. The affidavit charges that the defendant has paid all of said promissory notes to the plaintiff except the sum of $194.98; that on account of the refusal of the plaintiff to deliver to the defendant the other certain motor truck on which there was given a credit of $250.00 plaintiff in indebted to this defendant in the sum of $250.00 which is $55.84 more than this defendant is indebted to plaintiff, and the defendant further says that he is not indebted to the plaintiff in any sum; that the said note has been paid; that plaintiff is indebted to the defendant in the sum of $55.84 and the defendant further says that he verily believes that he has a good defense to the said suit upon the merits as to the whole of plaintiff's demand.

A further motion of defendant to vacate said judgment and for leave to plead to the merits, supported by an affidavit, charges that said promissory note in question and power of attorney in plaintiff's declaration mentioned was executed by defendant to secure monthly payments on a certain contract of purchase; that one of the motor trucks purchased has not been delivered by the plaintiff to the defendant though often requested to do so and in this respect plaintiff has failed to carry out his part of said contract of purchase; that by said contract of purchase plaintiff sold to defendant three certain motor trucks for the sum of $4605.00; that by said contract of purchase the plaintiff acknowledged payment of $1500.00 allowance for a used car; and that said used car was delivered to the plaintiff by the defendant and accepted by the plaintiff; that $1250.00 or $625.00 each was applied on two of

for the [illegible]
the plaintiff [illegible]
ance; that [illegible]
follows: [illegible]
the other [illegible]
agreement [illegible]
motor truck [illegible]
to the defendants [illegible]
applied upon [illegible]
the defendants [illegible]
except the [illegible]
tiff to do [illegible]
there was [illegible]
ant in the [illegible]
indebted to plaintiff [illegible]
indebted to the [illegible]
that plaintiff [illegible]
the defendants [illegible]
defense to the [illegible]
demand.

A [illegible]
to plead to the [illegible]
promissory [illegible]
clarations [illegible]
ments on [illegible]
purchase [illegible]
often [illegible]
carry out [illegible]
of preal[illegible]
the sum [illegible]
[illegible]
[illegible]
[illegible]
[illegible]

said motor trucks delivered by the plaintiff to the defendant and a credit of $250.00 on said third certain motor truck to be delivered in August, 1923 which plaintiff refuses to deliver and that by reason of the breach of said contract of purchase the defendant is not indebted to the plaintiff; that said judgment has not been entered in accordance with the said power of attorney in that said judgment is excessive.

The question presented by this appeal is whether the affidavits disclose a clear and equitable reason for opening up the judgment and allowing appellant to plead. There is no dispute as to the facts.

A judgment by confession will not be opened unless the defendant shows a prima facie defense to the merits of the case. Blake et al, vs. The State Bank of Freeport, 178 Ill. 182-184.

If the affidavits when considered disclose a clear and equitable reason for opening the judgment and allowing the defendant to plead, then it is the duty of the court in the exercise of such equitable powers to so order. Pearce v. Miller, 201 Ill. 188.

It is the contention of the appellee that the matters and things set up in the affidavits are merely conclusions and that they fall short of a compliance with the rules requiring the defendant to state a prima facie case showing an equitable reason why the judgment should be vacated. It will be observed that the third truck was to be delivered on or about August 23, 1923, and the affidavits show that it was not so delivered and has not been delivered by the plaintiff though often requested. Such statements are not conclusions but are facts and if proven would constitute a defense.

We are of the opinion that by reason of the showing made in the affidavits the court erred in denying the motion to open up the judgment and to permit the defendant to plead to the merits of the case and for that reason the judgment of the Circuit Court of Winnebago County will be reversed and the cause remanded.

Reversed and Remanded.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of Feb. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson

Clerk of the Appellate Court.

abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

240 I.A. 678

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

First National Bank of Galesburg,
a corporation, and Scott Ford,
appellees,

vs.

Caroline S. Ford,
appellant.

Appeal from the Circuit Court
of Knox County.

Partlow, J.

Appellee, First National Bank of Galesburg, filed its bill in the circuit court of Knox county against Scott Ford, Caroline S. Ford, his wife, and their two daughters, Eloise Ford, and Pauline Ford, to foreclose a deed which was in fact a mortgage, upon certain real estate in Galesburg, in which the homestead rights were not waived because the wife did not join in the conveyance. The bill alleged that the homestead was not waived and prayed that it be set off, or that its value be fixed at $1000.00, as provided by statute. Scott Ford filed an answer admitting the execution of the deed and alleging that it was a mortgage. He denied that the deed conveyed the homestead, but claimed a right of homestead to the extent of $1000.00, and asked to have the same set off. Caroline S. Ford and her two daughters filed an answer in which they denied that Scott Ford was entitled to a homestead, but alleged that Caroline S. Ford was entitled to a homestead, alleged that Scott Ford and his wife had been living separate and apart since 1917; that Scott Ford was estopped from claiming a homestead as against the homestead rights of his wife for the reason that in the deed or mortgage he had expressly released all right to the same; that since 1917 the wife has had the responsibility of the family, living with her two daughters in the household; that the conveyance to the bank in no wise affected her rights. Upon a hearing the court found in favor of complainant, and granted a decree of foreclosure for $5602.55, together with a solicitor's fee of $550.00; found that Scott Ford was entitled to a homestead in the premises of $1000.00, and that the wife was entitled

[illegible]

First National [illegible]
a corporation, and [illegible]

[illegible]

vs.

Carolina [illegible]

[illegible]

Bartlow, J.

Appellee, [illegible]
the circuit [illegible]
his wife, [illegible]
foreclose [illegible]
estate in [illegible]
because the [illegible]
that the [illegible]
that it [illegible]
Ford filed [illegible]
ing that [illegible]
homestead, [illegible]
and asked [illegible]
daughters [illegible]
entitled [illegible]
titled to [illegible]
living [illegible]
from [illegible]
wife [illegible]
released [illegible]
the [illegible]
the [illegible]
her [illegible]
and [illegible]
sufficient [illegible]
homestead [illegible]

to inchoate right of dower, appointed commissioners to set off the homestead to him if it could be done, otherwise out of the proceeds of the sale he was to be paid $1000.00 in lieu of his homestead rights. From this decree appellant, Caroline S. Ford, has appealed to this court.

The only question which she raises on this appeal is whether the homestead rights belong to her or her husband. In support of her contention that she is entitled to the homestead rights, appellant insists that the law will not permit a man to do indirectly what he is prohibited from doing directly; that if the court sustains the decree giving Scott Ford the homestead to the exclusion of the wife and daughters, that he, by arrangement with the bank, is cutting his wife out of her homestead rights; that under the decree Mrs. Ford is to be removed from the premises and the homestead awarded to her husband without any provision for another homestead as required by law, and without any intention on his part to have anything to do with his family.

The evidence shows that in 1900, Scott Ford purchased the premises in question. He built a house which he has occupied with his family since that time as a homestead. The evidence of the wife was that since 1917, she and her husband have been estranged, they do not live together as husband and wife, and this was without her fault; that he has not supported the family as its head; that they all lived on the premises; that she objected to her husband becoming involved with the bank financially; that she and the daughters have, in fact, kept the house in repair for several years; that she contributed to the purchase price of the property; that he bought a quart of milk, or a little bacon, now and then, but had not contributed a cent towards bread, sugar, or other provisions since 1917; that he had not ~~dressed~~ clothed his wife for years and his daughters have both worked and earned wages and have been clothing the mother; that he contributed little towards the repairs on the place; that after 1922, he gave the wife $9.00 a week, but that would not pay the grocery and meat bill;

to induce [illegible]
homestead to the [illegible]
of the said [illegible]
rights. [illegible]
to this court.

The only [illegible]
the homestead [illegible]
her counsel [illegible]
last instr[illegible]
he is prohibited [illegible]
decree giving [illegible]
and daughter, [illegible]
with out [illegible]
to be remove[illegible]
head with [illegible]
and without [illegible]
his family.

The evidence [illegible]
less in [illegible]
family [illegible]
that since [illegible]
not live [illegible]
that he [illegible]
on the pre[illegible]
with the [illegible]
kept the [illegible]
the [illegible]
or [illegible]
worse [illegible]
clothed [illegible]
carried [illegible]
still [illegible]
the $.00 [illegible]

that he has never paid anything since the previous November; that he paid the taxes and made some repairs on the property; that other repairs were made by the bank and by the daughters. One of the daughters testified that the father and mother were living separate and apart without the fault of the mother, and that the daughters were contributing to her support.

Section 1, Chapter 52, provides that every householder, having a family, shall be entitled to a homestead of $1000.00 in the premises occupied by him as a residence, which shall be exempt. Section 4 provides that no release, waiver, or conveyance of the estate so exempt, shall be valid unless the same is in writing subscribed by said householder and his wife, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged; and in all cases where such release shall be taken by way of mortgage or security, the same shall only be operative as to such specific release, waiver, or conveyance; and where the same includes different pieces of land, or the homestead is of greater value than $1000.00, said land shall first be sold before resorting to the homestead, and in case of the sale of such homestead, if any balance shall remain after the payment of the debt and costs, such balance shall, to the extent of $1000.00, be exempt, and be applied upon such homestead exemptions in the manner provided by law. Section 8 provides that in the enforcement of a lien, in a court of equity, upon premises including the homestead, if such right is not waived or released, as provided in this Act, the court may set off the homestead and decree the sale of the balance of the premises; or if the value of the premises exceeds the exemption, and the premises cannot be divided, may order the sale of the whole, and the payment of the amount of the exemption to the person entitled thereto. Section 16, Chapter 68, provides that neither the husband nor wife can remove the other or their children from their homestead without the consent of the other, unless the owner of the property shall in good faith, provide another homestead suitable to the condition in life of the family.

[illegible]

In McCauley v. Jones, 295 Ill. 614, it was held that this last section does not enlarge the homestead estate; that the owner of a homestead estate is not entitled to retain the exclusive possession of real estate worth more than $1000.00 because the property is incapable of division and the homestead estate in it therefore cannot be assigned, but that a court of equity under its general chancery power has jurisdiction to enter a decree adjusting the respective rights of the heirs, devisees, or grantees of the owner of the fee and the person entitled to the homestead estate. Upon the application of such heirs, devisees or grantees a homestead may be set off, or if that cannot be done, the court may require the holder of the estate to surrender the possession of the premises upon the payment of $1000.00.

The deed or mortgage in this case was not signed by the wife, therefore the homestead was not released as provided in section four either as to Ford or his wife. This was recognized in the bill filed to foreclose. The premises were worth about $10,000.00. The decree complied in all respects with sections four and eight, and was valid as far as the rights of the bank were concerned. The bank was entitled to a sale subject to the homestead and dower, as provided in the decree.

Where a wife is compelled by her husband, against her will and without her fault, to live separate and apart from him, he cannot deprive her of her homestaed estate by conveying the land by deed in which the wife does not join. Blankenship v. Hall, 233 Ill. 116. Under such circumstances the right of homestead may be in the wife, and this is true even though the husband and wife are living in the same house, but not as husband and wife. Bobowsky v. Bobowsky, 142 Ill. 524; Jones v. Jones, 281 Ill. 595. During the lifetime of the husband who is living with the family, the general rule is, that the right of the wife to a homestead is analogous to her inchoate right of dower and is not a freehold estate. Taylor v. Taylor, 223 Ill. 423. Where the husband is living, and resides with

In McDowell v. Jones, 328 Ill. 61, [illegible]
section does not enlarge the homestead [illegible]
homestead estate is not certain, [illegible] exact [illegible]
of real estate which were then [illegible]
capable of alienation and the homestead [illegible] in it [illegible]
be assigned, but [illegible] of [illegible]
power has jurisdiction to [illegible]
rights of the wife, [illegible]
and the person entitled to the homestead [illegible]
tion of such heirs, devisees or grantees [illegible]
or if that cannot be done, the court may [illegible]
estate to surrender the possession of the [illegible]
of $1000.00.

The dead [illegible] in this [illegible]
therefore the homestead was not [illegible]
either as to land [illegible]
filed to foreclose. The [illegible]
decree compelled in all respects [illegible]
was valid [illegible]
was entitled to [illegible]
vided in the decree.

[illegible] is contended [illegible]
without her fault, to use [illegible]
derive [illegible]
in which [illegible]
Under such [illegible]
and this is [illegible]
same house, but [illegible]
Ill. 82; [illegible] v. [illegible]
of the husband [illegible]
that the right of the [illegible]
elsewhere right [illegible]
Taylor, 328 Ill. 482. [illegible]

his family, he is generally the householder and the head of the family. It is only upon his death, or when he deserts his family, or drives them away, that the homestead vests in the wife.

It is the intent and purpose of the law, as far as possible, to protect the entire family in the household rights. When the homestead exceeds $1000 in value and has been sold and the $1000 paid to the person entitled thereto, the $1000 may be in danger of being lost, spent or squandered by reason of the fact that it was in cash. If the head of the family has not, by his misconduct, forfeited his right of homestead, he is entitled to the $1000 in cash regardless of the danger that it may be lost, spent or squandered. Ford was living. He slept at home and took part of his meals there. He provided, to some extent, for the household expenses, paid some money to his wife, paid the taxes, made certain repairs, and purchased certain provisions for the family. The mere fact that he and his wife did not agree, that they were estranged and quarreled, did not live together as husband and wife should live, that he did not pay all of the family expenses, or the cost of maintaining the home, and part of this expense was paid by his daughters, was not sufficient to justify the chancellor in holding that he had forfeited his right of homestead and that the right had vested in the wife.

We find no reversible error and the decree will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of Feb. in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

abstract only

240 I.A. 679

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 19 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Leonard Stuckert, a minor
By John Stuckert, his father
and next friend,

Plaintiff in Error,

vs.

James J. Moran,

Defendant in Error.

240 I.A. 679

Error to the Circuit Court
of La Salle County.

Partlow, J.

Plaintiff in error, Leonard J. Stuckert, a minor, by John Stuckert, his next friend, began an action on the case in the circuit court of La Salle County, against defendant in error, James J. Moran, for malpractice. At the close of the evidence on behalf of plaintiff in error the court directed a verdict in favor of defendant in error, and a writ of error has been prosecuted from this court to review the judgment.

The declaration consisted of three counts all of which alleged, in substance, that defendant in error was a duly licensed physician and surgeon, practicing his profession, and was retained by plaintiff in error to treat him for hire for a certain sickness. The first count further alleged that defendant in error treated the plaintiff in error for to-wit, five months; that not regarding his duty, during that time, he so unskillfully and negligently conducted himself in the premises that by and through his want of skill and care, the sickness of plaintiff in error became greatly increased and aggravated, other maladies were caused, and unnecessary injuries inflicted upon him; that plaintiff underwent great annoyance, anguish, distress, and bodily injury, became greatly reduced, weakened and injured in body, and has ever since so continued to suffer. The second count alleged that on March 15, 1921, the plaintiff in error was suffering from congestion of the lungs, or disorder within the pleural

Leonard [illegible],
By John [illegible],
and next friend,

[illegible]

vs.

James L. [illegible],

[illegible]

Partlow, J.

[illegible]

Stuckert, [illegible]
court of [illegible]
for mainte[illegible]
in error [illegible]
and a writ [illegible]
judgment.

[illegible]

alleged, [illegible]
objection [illegible]
plaintiff. [illegible]
first [illegible]
plaintiff [illegible]
duty, [illegible]
himself [illegible]
care, [illegible]
and [illegible]
inflic[illegible]
dilate [illegible]
[illegible]
count [illegible]
[illegible]

cavity; that he was taken to St. Mary's Hospital in Spring Valley, and on March 20, 1921, defendant in error cut a large incision in the chest or pleural cavity of plaintiff in error, and inserted drainage, consisting of a rubber tube, three-fourths of an inch in diameter, and five inches long, which was to remain for thirty-six hours to carry off the fluid or pus; that it was the duty of the defendant in error to exercise due care and skill in inserting the tube and fastening the same so it could not slip, or be drawn into the wound, yet the defendant in error carelessly, negligently and unskillfully so inserted and fastened the tube in said incision that the tube slipped into, or was drawn into the body of the plaintiff in error, where it remained for four months, by means whereof the plaintiff became sick, sore, lame, etc. The third count was substantially the same as the second and in addition it charged the duty on the part of the defendant in error, after the tube slipped or was drawn into plaintiff in error's body, to remove the same, but that by reason of his want of care and skill in that behalf he permitted said tube to remain in said body for, to-wit, four months. To the declaration the general issue was filed.

The evidence consisted of the testimony of plaintiff in error, his father, Sister Edwina of St. John's Sanitarium, Springfield, and Dr. Charles W. Compton of Springfield, who finally secured the tube, and shows that plaintiff in error was nineteen years of age in October, 1920, was in good health, and weighed about one hundred and fifty pounds. On December 21, 1920, he had an attack of pneumonia in his right lung, and was confined to his bed about three weeks, after which he recovered so as to be about the house. He later began to suffer from empyema, or pus in the pleural cavity. He was then living with his father in Cherry, Illinois, and was treated for pneumonia by Dr. Westmore, now deceased. He had pain and a slight swelling in his chest and was informed by Dr. Westmore there probably was pus in the cavity. He went to defendant in error at Spring Valley

cavity; that he was [illegible]

and on March 20, [illegible]

the chest or pleural cavity [illegible]

drainage, [illegible]

diameter, [illegible]

hours to carry off the fluid or [illegible]

defendant in error [illegible]

tube and [illegible]

the wound, yet the [illegible]

unskillfully [illegible]

the tube allowed [illegible]

error, where it remained [illegible]

plaintiff became [illegible]

substantially the same [illegible]

on the part of the [illegible]

drawn into plaintiff [illegible]

by reason [illegible]

said tube to [illegible]

declared [illegible]

The evidence [illegible]

error, [illegible]

and Dr. [illegible]

tube, [illegible]

October, [illegible]

fitt, [illegible]

in his [illegible]

after [illegible]

to [illegible]

living [illegible]

[illegible]

[illegible]

was [illegible]

and was informed that he had pus in the pleural cavity. He went to the hospital in Spring Valley, and on March 15, 1921, an incision about two inches long was made in his right breast by defendant in error and a rubber tube about three inches long and three-eighths of an inch in diameter was inserted for drainage. On the following day the wound was dressed by a sister at the hospital, and plaintiff in error testified that he saw the end of the tube protruding about an inch out of the incision. The defendant in error assisted in dressing the wound on that day. On the next day plaintiff in error was taken to the dressing room, and after the bandages were removed it was discovered that the tube was missing. The nurse called the defendant in error and he told her that the tube had probably been lost in the dressing. Plaintiff in error was put under a fluoroscope, and he testified that defendant in error, in the presence of Dr. Dunn, stated that the tube was in the pleural cavity. He also testified that at all times thereafter defendant in error assured him that the tube was not in the pleural cavity. After the wound was dressed, another tube was inserted, and plaintiff in error testified that when it was inserted he complained that it touched the missing tube within him. In the end of this second tube defendant in error put a safety pin to keep it from slipping into the incision. Before putting in the second tube the defendant in error probed the wound with a pair of tweezers to locate the tube but did not find it. Two days later another pocket of pus formed higher up and defendant in error put in another tube, and four days later a third tube was inserted. A third operation was performed about a month later, an incision was made in the back, and a tube was put in this incision. Plaintiff in error testified that defendant in error cut three openings in the breast and inserted tubes. He also testified that in the latter part of June, the defendant in error took him out for an automobile ride, told him he had a chronic abcess, and he was going to send him some place where he would be all right he hoped in a month and a half or so.

The plaintiff in error was subsequently removed to St. John's Sanitarium in Springfield, put to bed and given treatments. Plaintiff in error testified that sometime in September, while being dressed by one of the nurses in the hospital, the tip of a rubber glove came our of one of the wounds, and when this occurred, plaintiff in error testified that he insisted that the tube must be still in him. The plaintiff in error is not corroborated with reference to the tip of the glove coming out of the wound. The sister at the hospital who dressed him had no recollection of any such occurrence. An X-ray was taken of the plaintiff's chest, what appeared to be the tube was located, he was taken to St. John's Hospital in Springfield, where he was examined by Dr. Compton under a fluoroscope. The tube was located in the pleural cavity. Dr. Compton cut an incision, took out a piece of the rib, made one opening in the front and another in the rear, and on the following morning the tube was located at the opening in the rear under the shoulder and was removed.

Plaintiff in error testified that the tube was placed in a bottle, it was offered in evidence, and there is evidence that it bearm no marks of having any safety pin or needle puncture in it. Plaintiff in error testified that the wounds occasionally broke open and caused trouble; that he was able to do some work but could not perform very much hard work.

Dr. Compton testified that when drainage by means of a tube is inserted it is necessary to fasten the tube in some way, either by silkworm suture sewed to the flesh, or by an ordinary safety pin inserted through the end of the tube, to prevent the tube from being drawn in or from slipping into the incision.

It is insisted as ground for reversal that the court committed error in directing a verdict for defendant in error.

Physicians are not required to possess the highest degree of skill. It is their duty to exercise reasonable and ordinary care, skill, and diligence in the practice of their profession. Their

The plaintiff in error was subsequently [illegible] Sanitarium in Springfield, put to bed and [illegible]. Plaintiff in error testified that sometime in September, [illegible] dressed by one of the nurses in the hospital, the [illegible] glove came out of one of the sounds, and then this occurred. Plaintiff in error testified that he imagined that the tube [illegible] in. The plaintiff in error is not corroborated with [illegible] to the fact of the glove coming out of the sound. The nurse [illegible] dressed him had no recollection of [illegible] "X-ray" was taken of the plaintiff's chest, [illegible] to be the tube was located, he was taken to St. John's hospital in Springfield, where he was examined by Dr. Compton under a fluoroscope. The tube was located in the pleural cavity. Dr. Compton [illegible] incision, took out a piece of the rib, made one [illegible] the rear, and on the following morning the tube was located at the opening in the rear under the shoulder and was removed.

Plaintiff in error testified that the tube was [illegible] bottle, it was offered in evidence, and there is evidence that it bears no marks of having any safety pin [illegible] thereon. Plaintiff in error testified that the nurse [illegible] and caused trouble; that he was able to do some work but could not perform very much hard work.

Dr. Compton testified that [illegible] is inserted it is necessary to [illegible] silkworm suture served to the fleur, [illegible] inserted through the end of the tube, [illegible] drawn in or four silkworm into the isolation.

It is insisted as ground [illegible] committed error in directing [illegible] error.

Physicians are not required to possess [illegible] of skill. It is their duty to exercise [illegible] skill, and diligence in the practice of their profession. [illegible]

failure to exercise such a degree of care and skill renders them liable for damages. Quinn vs. Donovan, 85 Ill. 194; Hallam vs. Means, 82 Ill. 372; McKee vs. Allen, 94 Ill. App. 147; Moline vs. Christie, 180 Ill. App. 334. The mere fact that there are bad results, or that an injury was caused by reason of a mistake in judgment, is not sufficient to justify a recovery. Sims vs. Parker, 41 Ill. App. 282; Phedus vs. Mather, 181 Ill. App. 274; Danson vs. Allen, 191 Ill. App. 399; Graiziger vs. Henssler, 229 Ill. App. 365. The doctrine of res ipsa loquitur does not apply in cases of this kind, and the burden of proof is upon the plaintiff to prove the negligence charged in the declaration. Whether or not the treatment was ordinarily skillful and the physician's conduct and management of the case was that of an ordinarily careful and skillful physician is largely an expert question to be determined from the testimony of witnesses learned and experienced in that kind of service. Goodman vs. Bigler, 133 Ill. App. 301; Kruger vs. McCaughey, 149 Ill. App. 440; Moline vs. Christie, 180 Ill. App. 334; Phebus vs. Mather, 181 Ill. App. 274; Graiziger vs. Henssler, 229 Ill. App. 365.

The main question for determination is whether or not, under the authorities cited, there was any evidence in the record fairly tending to support the allegations of the declaration sufficient to entitle plaintiff in error to have his case submitted to the jury. The first count of the declaration charged general negligence and unskillfulness. The second charged that defendant in error so carelessly, negligently and unskillfully inserted and fastened the tube that it slipped or was drawn into the body. The third is that after the tube entered the body that by want of care and skill it was permitted to remain in the body. All of the evidence offered was in support of the allegations that the tube was improperly fastened, or was not fastened at all, and in support of the allegation that after the tube entered the body that it should have been removed by defendant in error. The only medical evidence was that of Dr. Compton who testified as to the manner in which such a tube should

failure to exercise [illegible] damage [illegible]
liable for damages. [illegible]
82 Ill. 378; [illegible] v. [illegible], 94 Ill. [illegible]; [illegible]
180 Ill. App. [illegible]
an injury was [illegible]
sufficient to justify [illegible]
Phelps vs. [illegible], 143 Ill. [illegible]; [illegible]
399; Graninger vs. [illegible]
res ipsa loquitur [illegible]
burden of proof [illegible]
in the defendant. [illegible]
skillful and the physicians' [illegible]
that of an ordinary [illegible]
expert question to be determined [illegible]
learned and experienced in that kind [illegible]
183 Ill. App. 321; Kinney v. [illegible], 144 Ill. [illegible]
vs. Christie, 160 Ill. App. 384; [illegible], 141 Ill. [illegible]
274; Graninger vs. [illegible], 160 Ill. [illegible].

The [illegible]
under the authorities cited, [illegible]
fairly [illegible]
sufficient [illegible]
to the jury. [illegible]
negligence [illegible]
in error [illegible]
fastened the [illegible]
third is [illegible]
and still [illegible]
offered [illegible]
fact [illegible]
that after [illegible]
by defendant in error. [illegible]
Compton who testified [illegible]

be fastened. This evidence is very meager. It does not go into detail as to the manner in which the silkworm suture should be fastened. Plaintiff in error was under an anesthetic at thettime the tube was inserted and did not know it had been inserted until the next morning when the wound was dressed. He testified that at that time it was not fastened to the flesh on the side of the wound and that there were no holes in the tube. He also testified that after the tube was finally removed there was no hole in it made by a pin or a needle. This evidence, taken in connection with the evidence of Dr. Compton that it was necessary to fasten the tube either by a silkworm suture sewed to the flesh, or by a safety pin inserted through the end of the tube, was sufficient to fairly tend to support the charge in the second count of the declaration, and entitle plaintiff in error to have the jury pass upon the facts presented.

Under the third count of the declaration, while there was no medical evidence that an immediate removal of the tube was necessary after it entered the body, still the fact that the tube was drawn into the body where it did not belong was some evidence that defendant in error should have made prompt effort to remove it. His subsequent efforts to locate and extract it tends to show that it was his duty to do so.

We are of the opinion that the court improperly directed a verdict, and the judgment will be reversed and the cause remanded.

Reversed and Remanded.

be tastened. [illegible]

detail as [illegible] in which [illegible] be tastened. Plaintiff in error was under [illegible] the tube was inserted [illegible]

the next morning [illegible] at that time it [illegible] wound and that there [illegible] that after the tube was [illegible] by a pin or a needle. [illegible] evidence of it. [illegible] either by a [illegible] inserted through the [illegible] to support the [illegible] entitle plaintiff in error [illegible] proceeded.

[illegible] no medical evidence that [illegible] after it [illegible] into the body [illegible] in error [illegible] efforts to [illegible] to do so.

[illegible]

a verdict, [illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Mar, in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

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Abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.

Hon. AUGUSTUS A. PARTLOW, Justice.

Hon. THOMAS M. JETT, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 19 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Angela McKay, by C. M. McKay,
her next friend,
appellee,

vs.

Briggs Coffman,
appellant.

Appeal from the Circuit Court
of Knox County.

240 I.A. 679

Partlow, J.

Appellee, Angela McKay, by C. M. McKay, her next friend, obtained a judgment in the circuit court of Knox county against appellant, Briggs Coffman, for $750.00, for personal injuries, and an appeal has been prosecuted to this court.

At the time of the accident Angela McKay was five years, seven months, and ten days old. She lived with her parents on the east side of Holton street in Galesburg. On Sunday, April 29, 1923, at about 12:45 P. M. she was on the west side of Holton street, opposite her home, playing with some small children. Appellant was driving an electric automobile north on the east side of Holton street, at from six to ten miles per hour. When the automobile was just south of the place of the accident the child started across the street to her home on the east side. The evidence on behalf of appellant is that she ran into his automobile, while the evidence on behalf of appellee is that she was struck by the automobile and knocked down. Her right leg was broken about three to six inches below the hip. She was in the hospital about six weeks, she suffered intense pain, later she had to walk with a crutch for some time, but finally she practically recovered. No complaint is made as to any ruling on evidence, or as to the weight of the evidence, and it is admitted that there was evidence fairly tending to support the judgment. For this reason it will be unnecessary to state the facts in greater detail. It is, however, insisted by appellant that the evidence was close and for that reason the instructions should have been accurate.

The amended declaration contained three counts. The first charged general negligence; the second alleged that appellant gave no

7582 October Term, [illegible].

Angela Tuke, [illegible] Valey,

her next friend,

appellee,

vs.

Bridge Dorton,

appellant.

Partlow, J.

Appellee, [illegible] ed a judgment in the circuit [illegible] Bridge Dorton, for [illegible] has been prosecuted [illegible].

At the time of the [illegible] months, and was [illegible] side of [illegible] about 12:45 [illegible] her home, [illegible] electric [illegible] six to ten [illegible] the place of the accident [illegible] her home on the east side. [illegible] that she ran into his [illegible] appellee in her [illegible] her right leg was [illegible] She was in a [illegible] later [illegible] practically [illegible] evid[illegible] that there [illegible] this [illegible] down. It [illegible] close and [illegible] charged general negligence [illegible]

warning of his approach, contrary to the statute; and the third alleged that appellant negligently and carelessly failed to keep a proper watch and lookout for persons crossing Holton street.

The ninth instruction on behalf of appellee, told the jury that "they should take into consideration the whole of the evidence and all of the facts and all the circumstances proved on the trial." Appellant contends that this clause would lead the jury to believe that they should consider the evidence, the circumstances proved on the trial, and all the other facts, separating the facts from the evidence and the circumstances proved on the trial, and it allowed the jury to consider facts not in evidence. In support of this contention Balenovic v. Ansick, 181 Ill. App. 660, is cited. The case cited does not sustain the contention of appellant. The clause of the instruction in that case was as follows: "and from all of these facts, as shown by the evidence, and from all other facts and circumstances, the jury must decide on which side is the preponderance." The instruction in that case was not limited to facts and circumstances proved on the trial, and the court held that under such an instruction the jury might consider facts not in evidence. The instruction in the case at bar is entirely different. It limited the facts and circumstances to be considered to those which were in evidence. It was in no wise misleading or erroneous.

The tenth instruction on behalf of appellee told the jury "that the word 'accident' as used in these instructions is used to designate or denote the occurrence or event which the plaintiff claims resulted in injury to her." It is insisted that this was not the sense in which the word accident was used in several other instructions; that appellant's eleventh modified instruction was to the effect that if the injury complained of was the result of a mere accident which occurred without negligence on the part of appellant, the jury should find the appellant not guilty; that if the word accident as used in the eleventh instruction meant a mere occurrence that the instruction would have no meaning whatever, and for that reason appellee's tenth instruction was prejudicial.

[illegible]

The Standard Dictionary defines an accident as an occurrence or event. In Kaminski v. Chicago City Railway Company, 181 Ill. App. 706, on page 710, the court said: "It clearly appears from a reading of the entire instruction that the word 'accident' was used to designate the occurrence or happening in question, and must have been so understood by the jury." We think the definition of an accident as given in the tenth instruction was in accordance with this rule of law and there was no error in giving it.

The sixteenth instruction on behalf of appellee, after stating certain facts, in defining the duty of appellant, told the jury that if appellant "negligently failed to use every reasonable precaution at and immediately before the time of the injury to the plaintiff in question to avoid injuring the plaintiff, and by reason of such negligence, if any, appellee was injured, that she might recover." The fifteenth instruction given on behalf of appellee contained substantially the same language above quoted. It is contended by appellant that no count of the declaration charged such a degree of care or act of negligence on the part of appellant, and that both of these instructions were erroneous for that reason; that these instructions eliminated all possibility of the exercise of judgment by the driver of the automobile, and gave him no opportunity to choose between two or more mutually inconsistent precautions, even though an ordinarily prudent person would, under the same circumstances, necessarily have used the one precaution rather than the other.

Section 40 of the Motor Vehicle Act provides that upon approaching a person walking upon or along a public highway, the operator of a motor vehicle shall give reasonable warning of his approach, and use every reasonable precaution to avoid injuring such person, and if necessary stop his motor vehicle until he can safely proceed. The first count of the declaration in substance alleged that it was the duty of the appellant to drive, manage, operate, control, and direct said automobile so as not to injure appellee; yet appellant not regarding his duty in that behalf, then and there so negligently,

The standard dictionary defines [illegible]
or event. In Ballantine v. Tillman [illegible]
706, on page 710, the court [illegible]
of the entire instruction that [illegible]
made the occurrence of [illegible]
understood by the jury. [illegible]
given in the court's charge [illegible]
law and there was no error in it [illegible].

The sixteenth instruction [illegible]
certain facts, in effect [illegible]
if appellant "negligently [illegible]
at and immediately before the [illegible]
question to such injury to the [illegible]
negligence, if any, [illegible]
The fifteenth instruction [illegible]
substantially the same [illegible]
last that no result of the [illegible]
or act of negligence [illegible]
instructions were [illegible]
eliminated all possibility of [illegible]
of the [illegible]
or more [illegible]
prudent person would, under [illegible]
used the [illegible]

Section [illegible]
ing a [illegible]
of a [illegible]
was [illegible]
necessary [illegible]
first [illegible]
but, of the appellant [illegible]
and automobile [illegible]
[illegible]

carelessly, recklessly, and improperly drove, managed, operated, controlled, and directed said automobile that by reason of the improper conduct, negligence, carelessness, and recklessness of appellant as aforesaid, the said automobile then and there ran upon and struck appellee with great force and violence and greatly injured her. This general allegation of negligence was a sufficient allegation of negligence, and it was not necessary to specifically set out in that count the Motor Vehicle Statute and its provisions in order to entitle appellee to offer proof of a violation of that statute. Wagner v. Chicago, Rock Island & Pacific Ry. Co., 277 Ill. 114; Lasley v. Crawford, 228 Ill. App. 590; Illinois Central Railroad Co. v. Aland, 192 Ill. 37; Chicago & Alton Railroad Co. v. Redmond, 70 Ill. App. 119. Where an instruction is in the language of the statute upon which it is based it is sufficient. Greene v. Fish Furniture Co., 272 Ill. 148; Mertens v. Southern Coal Co. 235 Ill. 540; Danley v. Hibbard, 222 Ill. 88; Kellyville Coal Co. v. Strine, 217 Ill. 516. Under the statute it was the duty of appellant upon approaching appellee as she was crossing Holton street to use every reasonable precaution to avoid injuring her, and if in order to avoid injuring her the appellant, in the exercise of reasonable precaution, should have stopped his automobile it was his duty, under the statute, to do so. The duty of appellant commenced from the time he approached appellee walking upon the highway, and his duty related to the management and driving of his automobile as he approached her. The legislature saw fit to pass a statute applicable to such facts. The instruction was in the language of the statute. If there was any error it was in the statute and not in the instruction. The instruction was proper under the statute and the allegation of the first count of the declaration, and for that reason there was no error in giving it.

The sixteenth instruction concluded by telling the jury that they might assess such damages as they found, from a preponderance of the evidence, would compensate appellee for any damages she had sustained. It is insisted by appellant that medical and hospital

expenses, and loss of earning power during minority, were not proper elements of damages; that the jury knew appellee was in the hospital for several weeks and was attended by two physicians; that the jury would think her damages might include the cost of medical and hospital services, and therefore this instruction was misleading and erroneous. There was no evidence as to hospital or medical expenses, or as to her earning power during minority. The instruction is that she may recover such damages as a preponderance of the evidence shows will compensate appellee. If there was no evidence as to medical and hospital expenses it will not be presumed that the jury included such items in their verdict.

The fifteenth instruction, among other things, stated that if the jury believe from the preponderance of the evidence that appellant failed and neglected to sound a horn, or give reasonable warning of the approach of said automobile, and by reason of such negligence, if any, the car struck appellee, the verdict should be for appellee. The instruction is not quite accurate. It directs a verdict and should have recited all of the material facts. It should have told the jury that if they believed from the preponderance of the evidence that appellant, in the exercise of due care, should have sounded a horn, or given reasonable warning, and negligently failed to do so, and that such failure constituted negligence, and appellee as the result thereof, was injured, that the verdict should be for appellee. We do not feel justified, however, in reversing the judgment solely on account of this error.

The only evidence as to the age of Angela McKay was by her mother, who testified that at the time of the accident she was five years, seven months and ten days old; that she was born September 19, 1917. The child was under seven years of age and she was therefore incapable of conduct constituting contributory negligence. McDonald v. City of Spring Valley, 285 Ill. 52; Richardson v. Nelson, 221 Ill. 254; Seley v. Eckhardt, 233 Ill. App. 584. It was not necessary for the instructions to state that appellee must be in the

[illegible]

exercise of due care. The question of her contributory negligence was not in the case and reference to it was properly omitted from the instructions. The third, fourth and fifth instructions on behalf of appellant were on the question of contributory negligence by appellee and were properly refused.

Appellant's second refused instruction told the jury that if they believed that appellant did certain things in the operation of his automobile the jury should find that he was using ordinary care and they should find the defendant not guilty. The acts specified were that the automobile was being driven at a reasonable rate of speed; that the horn was sounded a reasonable length of time and within a reasonable distance of the place of the accident to give warning of the approach of appellant; that appellant gave reasonable warning of the approach of his automobile; that he operated his automobile with ordinary care under the circumstances; that he kept proper watch and lookout for appellee. Appellant insists that this instruction details every specific act which the declaration charged as negligence; that it was a correct application of the pleadings to the evidence; that it was the converse of appellee's sixteenth given instruction.

The instruction limited the negligence to certain specific facts. Under the first count of the declaration appellee was entitled to prove any omission of duty. For this reason the instruction was not as broad as the declaration and it was properly refused. The subject matter of this instruction was covered in part at least by the eighteenth and nineteenth given on behalf of appellant, and its refusal, even if it was correct, was not sufficient to reverse the judgment.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Mar., in the year of our Lord one thousand nine hundred and ~~twenty-~~ six.

Justus L. Johnson
Clerk of the Appellate Court.

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abstract only

240 I.A. 679

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 19 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

240 I.A. 679

Warren Corning & Co.,
a corporation,
Appellee,

vs

Joliet Textile Mills,
a corporation,
Appellant.

Appeal from the Circuit Court
of Will County.

Partlow, J.

Appellee, Warren Corning & Co., a corporation, filed its bill in the circuit court of Will County against appellant, Joliet Textile Mills Company, a corporation, and the Joliet National Bank, for an accounting, the cancellation of a contract and chattel mortgage, and for an injunction. The bill was dismissed as to the Joliet National Bank. Appellant filed an answer denying that appellee was entitled to the relief prayed. It also filed a cross-bill claiming damages for the breach of the contract which was sought to be cancelled by the original bill. There was a hearing before the chancellor in open court, a decree was entered refusing damages under the original bill and the cross-bill, the cross-bill was dismissed, the principal prayer of the original bill was granted, and the cause was referred to a master to take an account upon certain transactions under the contract. From this decree an appeal has been prosecuted to this court.

Appellant owned a mill at Joliet for the conversion of waste. Appellee was engaged in selling waste to various railroad companies, and wanted to manufacture the product sold to its customers. On August 1, 1922, a written contract was entered into between the parties which was to continue for five years. Appellee agreed to furnish appellant raw material suitable for conversion into a finished product of waste, and appellant, in its mill, was to convert the raw material so furnished into waste and give appellee the exclusive sale of all material so converted. Appellee was to

furnish material in such quantities as would keep the mill working at full capacity which was estimated at 15000 pounds of raw material per day. The contract provided that while it was not intended that appellee should be held rigidly to supply 15000 pounds per day, but the amount furnished should not be substantially less than that amount. Appellee was to pay a conversion charge of $1.75 per 100 pounds on the material converted, which charge was based on an allowance of 50¢ per 100 pounds for the actual conversion process, and $1.25 per 100 pounds for overhead expenses necessary to the conversion. It was agreed that there should always be a net profit in the conversion charge of one-half cent per pound, but in the event it became possible for appellant to reduce the operating expense below $1.25 per 100 pounds, the benefit of such reduction should be divided equally between the parties. The conversion charge was to become due on each 100 pounds when it was packed, baled, marked, and ready for shipment, and was to be payable on the 16th day of the succeeding month. At the end of each fiscal year the value of what was found to be the average amount of raw material held each day at the mill was to be determined and appellant agreed to pay six per cent per annum on the average value so determined. The minimum amount of raw material to be furnished was not to be strictly adhered to during periods of strikes, labor troubles, business depressions, or in case of decreased sales of the finished product resulting from causes beyond the control of appellee.

The evidence shows that after this contract was executed the parties entered upon its performance and continued until January 22, 1923, when a supplemental contract was entered into which was to be effective from January 22, 1923, until February 3, 1923. This supplemental contract relieved appellee from the obligation, under the original contract, of furnishing a minimum of 15000 pounds per day and of paying a conversion charge of $1.75 per 100 pounds. In lieu thereof it was agreed that appellee was, during the time

furnish [illegible]
at [illegible]
per day. [illegible]
appellee [illegible]
the amount [illegible]
Appellee [illegible]
the material [illegible]
50¢ per [illegible]
100 pounds [illegible]
was agreed [illegible]
charge of [illegible]
for appell[illegible]
pounds, the [illegible]
between [illegible]
100 pounds [illegible]
and was [illegible]
the end of [illegible]
average [illegible]
determine [illegible]
average [illegible]
to be [illegible]
stated [illegible]
sales of [illegible]
of appellee.

[illegible]

the [illegible]
22. [illegible]
to be [illegible]
[illegible]
the [illegible]
[illegible]
lies [illegible]

specified in the supplemental agreement, to operate the mill and pay all expenses incident thereto. Appellee was to pay appellant at the termination of the supplemental contract, one-half of the net proceeds realized on the sale of all material manufactured. Appellant was to remain in possession of the mill and the goods of appellee therein contained. If a chattel mortgage on certain stock then held in the mill was released the stock was to be shipped as directed by appellee. The covenants of the original contract were to remain in effect so far as they did not conflict with the supplemental contract, and on the termination of the supplemental contract all of the provisions of the original contract were to be given full force and effect during the time provided therein.

On December 15, 1922, appellee borrowed $10000.00 from the Joliet National Bank and gave its promissory note therefor, payable in ninety days, secured by a chattel mortgage on the raw material owned by appellee in the mill, and appellant was made the trustee under this chattel mortgage. This is the chattel mortgage referred to in the supplemental contract. This chattel mortgage provided that appellee might sell or dispose of any portion of the stock mortgaged upon payment to the trustee of a sum equal to the market value of such goods, or upon depositing with the trustee goods of equal value with those to be disposed of, upon the written consent of the trustee executed by its president. All goods which appellee might thereafter so deposit with the trustee were to be covered by the mortgage. On January 13, 1923, appellee paid the trustee $2200.00 for stock withdrawn which amount was retained by the trustee, and was never applied on the mortgage but was later returned to appellee. On January 27, 1923, appellee tendered to the Joliet National Bank $7800.00, the balance then due on its note and mortgage, and demanded that the note be cancelled and the chattel mortgage released. The bank refused to cancel the note and refused to release the mortgage on the ground that $7800.00 was not the balance due thereon. On January 29, 1923,

specified in the [illegible]
all expenses incident thereto [illegible]
termination of the [illegible]
realized on the sale [illegible]
remain in possession of [illegible]
contained. [illegible]
the will [illegible]
appellee. [illegible]
effect as [illegible]
and on the [illegible]
visions of the [illegible]
effect during the [illegible]

On December 11, 1921, [illegible]
Joliet National [illegible]
in ninety [illegible]
owned by [illegible]
under [illegible]
to in the [illegible]
appellee [illegible]
upon [illegible]
such [illegible]
with [illegible]
executed [illegible]
as [illegible]
[illegible]
[illegible]
on [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

appellee paid the Joliet National Bank $9900.00 in full of the note, notwithstanding said payment of $2200.00 had been previously made. The bank cancelled the note and delivered it to appellee, and thereupon the trustee delivered to appellee his check for $2200.00, upon which check payment later was stopped by the trustee, but the check was finally paid on February 2, 1923, after the bill was filed in this case. Appellant did not release the chattel mortgage until after the bill was filed.

On January 29, 1923, after the note and chattel mortgage had been paid, Corning the president of appellee went to the mill and gave a written order to ship out all finished product on hand, and the agents and servants of appellant agreed to comply with the order but the shipment was not made because it was countermanded by Walsh, the president of appellant. Corning testified that at the same time he also ordered a small portion of unfinished stock shipped so he could raise money to meet some bills. The evidence on behalf of appellant on this point is that Corning at that time ordered all material shipped whether finished or unfinished; that he said appellee would be unable to carry out, and would not attempt to further carry out, the contract; that there was some talk of a settlement and cancellation of the contract; that Walsh offered to settle and cancel the contract for $5000; that it was agreed that no goods would be shipped until such a settlement was made and Corning agreed to be in Joliet on February 1, 1923, for the purpose of giving the final word on the settlement. The evidence on behalf of appellee is that Walsh said that not a thing would be shipped unless $5000 was paid; that Corning said he was going to get out of the contract because no shipments were to be made unless $5000 was paid. It is admitted by Corning that there was some talk of the cancellation of the contract and a settlement on the basis of $5000. The contention of appellee is that upon its offer on January 27, 1923, to pay the balance due on the note and mortgage, and the rufusal of the bank to accept the

appellee will t[illegible]

notwithstanding [illegible]

The bank concedes [illegible]

upon the trustee delivered to [illegible]

which check [illegible]

was finally paid [illegible]

this case. [illegible]

after the bill was filed.

[illegible]

had been paid, [illegible]

and have a written order [illegible]

and the month and [illegible]

order but the [illegible]

Walsh, the president of [illegible]

same time he also ordered [illegible]

so he could [illegible]

of appellant [illegible]

material [illegible]

would be [illegible]

out, the contract; [illegible]

concealed [illegible]

the contract for $600; [illegible]

shipped [illegible]

in Joliet [illegible]

word on [illegible]

Walsh [illegible]

that [illegible]

shipping [illegible]

Dorline [illegible]

and [illegible]

is that [illegible]

on the [illegible]

same, that appellee had a right to sell and ship all or any part of the stock whether finished or unfinished; that the refusal of appellant to accept payment, cancel the note, release the mortgage and permit shipment constituted such a breach of the contract as gave appellee the right to rescind the contract; that appellee did rescind the contract, and on February 1, 1923, filed its bill in this case.

The decree found that the original contract, the supplemental contract, and the chattel mortgage had been executed; that there was no misrepresentation on the part of appellant in regard to the capacity of its plant; that the plant had a capacity of about 15000 pounds per day if proper material was furnished; that appellee failed to furnish the orders, quality and quantity of materials required to keep the mill in operation; that on January 27, 1923, appellee offered to pay the mortgagee the full amount remaining due on the chattel mortgage; that upon such offer being made, appellee had the full right and power to sell and ship any part, or all, of the material then held at the mill, and that the refusal by appellant to allow the shipment constituted a breach of both the supplemental and original contract; that on January 29, 1923, appellee repudiated its obligations under both contracts and that such repudiation was justified because of the breach of said contracts by appellant on January 27, 1923, and its refusal to ship or permit appellee to ship the finished product as directed. The decree cancelled the contracts, and the temporary injunction granted upon the filing of the original bill was made permanent. No damages were allowed either party for breach of either contract under the original bill or cross-bill. The cause was referred to a master for an accounting of the transactions between the parties from October 9, 1922, to January 27, 1923. The cross-bill was dismissed.

It is stated by appellant that "under the facts as presented by the evidence, and by the decree of the court, the only question which is seriously raised by this case is whether the defendant is to be deprived of its right to recover because of its

same, [illegible]

the also [illegible]

to accept [illegible]

ability constituted [illegible]

the right to [illegible]

contract, [illegible]

The [illegible]

mental contract [illegible]

there was [illegible]

to the [illegible]

15000 [illegible]

failed to [illegible]

required to [illegible]

superfice [illegible]

on the [illegible]

had the [illegible]

the matter [illegible]

to allow [illegible]

and original [illegible]

its obligation [illegible]

justified [illegible]

January 27, [illegible]

the finite [illegible]

and the [illegible]

bill was [illegible]

breach [illegible]

The court [illegible]

motions [illegible]

27, [illegible]

[illegible]

caused by [illegible]

[illegible]

defendant [illegible]

alleged default on January 27, 1923."

There is very little dispute as to the law applicable to the facts here presented. It is practically agreed that equity had jurisdiction; that when equity assumes jurisdiction for one purpose it assumes jurisdiction for all purposes; that equity has jurisdiction to assess damages if the evidence justifies such assessment; that both the original bill and the cross-bill asked for damages, therefore neither party is in a position to dispute such jurisdiction as to damages. It is claimed by appellee that no damages should be assessed in favor of appellant for the reason that there were breaches of the contract by appellant, and that under the evidence any damages assessed would be speculative, and are not susceptible of proof.

The violation of a contract can only be made the basis for a rescision where such violation constitutes a material breach for which there can be no adequate compensation by the payment of damages, and which renders that portion of the contract still to be performed a thing different from what the parties originally contracted. Pittenger vs. Pittenger, 208 Ill. 582; Palmer vs. Meriden Co., 188 Ill. 508; Selby vs. Hutchinson, 4 Gil. 319; 3 Elliott on Contracts, 229. Where one of the parties repudiates a contract, the injured party has an election to treat the contract as rescinded, and recover upon the quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, he being at all times ready and able to perform, and at the end of the time specified he may sue and recover under the contract; or he may treat the repudiation as a termination of the contract for all purposes and sue for the profits he would have realized if he had not been prevented from performing it. Chicago Washed Coal Co. vs. Whitsett, et al, 278 Ill. 623; Lake Shore & Michigan Southern Railway Co. vs. Richards, 152 Ill. 59; City of Elgin vs. Joslyn, 136 Ill. 525. A waiver of rights under a contract must be either intentional, or based upon such facts and conduct as warrants an inference of the

alleged defamatory ", ...

There is [illegible]

the [illegible]

jurisdiction; [illegible]

it assumes jurisdiction [illegible]

to assess [illegible]

the original bill [illegible]

neither party is [illegible]

damages. It is claimed by [illegible]

in favor of [illegible]

contract by [illegible]

would be a [illegible]

[illegible]

a resolution [illegible]

which there [illegible]

and which [illegible]

a thing [illegible]

Pittsburgh [illegible]

III. 508; [illegible]

229. [illegible]

party [illegible]

upon the [illegible]

the [illegible]

tiffs [illegible]

le [illegible]

remuneration [illegible]

sue for [illegible]

vented [illegible]

et al, [illegible]

vat Alcoholic, [illegible]

A [illegible]

[illegible]

relinquishment of the rights. The acts upon which it is sought to base a waiver must be clear, unequivocal, and decisive, Willis Coal & Mining Co. vs. Missouri & Illinois Coal Co., 206 Ill. App. 192; 27 R. C. L. 909. The continuance of a contract in force after various breaches does not constitute a waiver of past breaches where the alleged waivers are conditioned upon future fulfillment of the contract. Glenridge Coal Co. vs. Marion County Coal Co., 205 Ill. App. 264. Where both parties have been guilty of a failure to perform strictly, they mutually waive the right to complain of non-performance until one party has put his adversary in a position where he may have such right of action by a failure or refusal to perform. Chicago Washed Coal Co. vs. Whitsett, 278 Ill. 623; Lehman vs. Webster & Co., 209 Ill. 264; Pennsylvania Coal Co. vs. Ryan, 107 Ill. 226; Consolidated Electric Sign Co. vs. Price, 192 Ill. App. 510.

It appears from the evidence that both the original contract and the supplemental contract were carried out only in part after considerable difficulty. At the time the original contract was executed appellant was financially embarassed. It was indebted in the sum of about $100,000. The only property which it apparently owned was its mill and machinery and about $10, 00 worth of material which was in the mill at the time the original contract was entered into, which stock was purchased by appellee, paid for in cash, and shipped out of the mill. Before appellant could operate under the contract it was necessary for it to make some kind of a settlement with its creditors. A composition was finally effected which provided for certain payments to be made by appellant on its old debts at regularly stated intervals. While the mill was being operated some of these payments became due. Appellant did not have the money to pay them and at the same time meet the pay-rolls. As a result several requests were made of appellee for advancements of money, which requests were apparently honored by appellee. The evidence also shows that the machinery in the mill was not in condition for operation at the time the contract was entered into. The contract did not specify any

relinquishment of the right. [illegible] base a waiver must be clear, [illegible] & Mining Co. vs. Missouri & Illinois [illegible] Co., 201 Ill. App. 124; 27 R. C. L. 900. The continuance of a contract in force after [illegible] breaches does not constitute a waiver of [illegible] where the alleged waivers are conditioned upon future sufficient [illegible] the contract. Glenridge Coal Co. vs. Marion County Coal Co., 205 Ill. App. 204. Where both parties have been guilty of a breach to [illegible] strictly, they mutually waive the right to complain of non-performance until one party has put his ad versary in a position where [illegible] such right of action by a failure or refusal to perform. Chicago Marked Coal Co. vs. Burnett, 175 Ill. 622; Lehmer vs. Weber & Co., 209 Ill. 264; Pennsylvania Coal Co. vs. Ryan, 177 Ill. 246; Consolidated Electric Sign Co. vs. Price, 198 Ill. App. 214.

It appears from the evidence that both the original contract and the supplementary contract were carried out only in part after considerable difficulty. [illegible] the original contract was executed specifically and financially [illegible] in the sum of about $100,000. The [illegible] property [illegible] owned was its [illegible] which was in the mill at the time the [illegible] contract was entered into, which stock was changed [illegible] shipped out of the mill. [illegible] contract [illegible] its creditors. [illegible] certain payments [illegible] stated interest. While the mill [illegible] payments [illegible] and at the same time [illegible] were made in replies for [illegible] arrearedly borrowed by [illegible] machinery in the mill [illegible] the contract was entered into. The contract [illegible]

certain time at which operations should begin. It appears that it would take at least ten days or two weeks to put the machinery in repair. There is considerable dispute as to just how much time was taken in getting the factory ready for operation. One of the witnesses who testified for appellant stated that he was in the factory on October 4, 1922, and that one of the machines was torn down and the parts distributed around the floor. The evidence shows that the first material was received about the middle of October and operations begun about October 17. There is evidence tending to show that the repairs made did not put the machinery in first class condition and that there were defects which interfered with first class work. One shipment of waste was rejected by the consignee because it was not properly manufactured, and this shipment was sent to another factory to be again sent through the machines. There is some evidence that there were delays on account of repairs to machinery, and on account of fires which originated from the operation of the machines. The decree makes no finding as to any default on behalf of appellant in carrying out its part of the contract.

On the other hand, the decree finds that appellee was in default for the reason that it did not furnish materials and orders sufficient to keep the plant in operation to the extent of 15,000 pounds per day. The evidence shows that when an invoice was taken on January 7, 1923, there were 350,000 pounds of material in the factory belonging to appellee. At the time the chattel mortgage was executed in December, 1922, there was material in the factory of the value of about $27,000.00 belonging to appellee. There is testimony that during the time the contract was in operation appellee spent over $70,000 in fulfilling its part of the contract. It is claimed, however, that notwithstanding this evidence, the material furnished was of an inferior grade and that it was not well balanced, that certain necessary materials which went into the finished product were not furnished, and the chancellor found this to be true. The evidence shows that there were a few days during the time the contract was in

certain time at which over tons of mud began. It was seen that it would take at least ten days or two weeks to [illegible] in repair. There is considerable dispute as to [illegible] time was taken in getting the factory ready for [illegible]. One of the witnesses who testified for appellant stated that he was in the factory on October 4, 1921, and that one of the machines was torn down and the parts distributed around the floor. The evidence shows that the first material was received about the middle of October and operations began about October 17. There is evidence tending to show that the repairs made did not put the machinery in first class condition and that there were defects which [illegible] first class [illegible]. The shipment of waste was rejected by the consignee because it was not properly manufactured, and [illegible] was sent to another factory to be again sent through the machinery. There is some evidence that there were delays on account of repairs to the machinery, and on account of fires which [illegible] the machines. The decree makes no finding as to [illegible] of appellant in carrying out its part of the contract.

On the other hand, the decree finds that appellee was in default for the reason that [illegible] sufficient to keep the [illegible] 2,000 pounds per day. The evidence [illegible] was taken on January 7, 1922, there were [illegible] in the factory belonging to appellee. [illegible] executed in December, 1917, [illegible] value of about $7,000.00 [illegible] that during the time the contract was in [illegible] over $75,000 in fulfilling its part of the contract. [illegible], however, that [illegible] was of an inferior grade [illegible], that certain machines, [illegible] not turn bad, and the chemicals [illegible] shows that there were a few defaults [illegible]

force when the mill was operated substantially to the extent provided in the contract, but during most of the time it was not operated to the extent of one-half of the amount provided in the contract, It also appears that during the time the contract was in force there were constant complaints by appellee that the overhead cost of production was so high that appellee could not sell its product on the market at a profit, and this was one of the reasons why the supplemental contract was entered into by the terms of which appellee assumed the operation of the plant at its own expense.

Appellant insists that the evidence does not support the finding in the decree that appellant made such a default on January 27, 1923, as justified appellee in rescinding the contract. In support of this contention it is insisted that the $2200 was not a payment on the chattel mortgage; that it was only received by the trustee as security for goods of that value which were shipped out; that under the terms of the mortgage the total amount secured thereby was to be paid to the mortgagee; that the trustee had no right to receive any payments, therefore appellee did not comply with the term of the mortgage when it tendered only $7800 to the bank, was not entitled to have the note cancelled or the mortgage released, or to rescind the contract.

We think the evidence shows that this contention was an afterthought on the part of appellant and that there was another reason why the payment was not applied on the mortgage. Corning testified that when the $2200 payment was made Walsh told him it would be applied on the mortgage. This is denied by Walsh, but it is apparent that this was the understanding of Corning for the reason that he only tendered to the mortgagee $7800 which would have been the balance due if the $2200 had been credited on the note. When the mortgagee refused to receive this amount Corning immediately tendered the full amount in addition to the $2200. It appears from the evidence that Walsh did not want the chattel mortgage paid off at this time, and we think this is the real reason he did not apply the $2200 on the

force when the [illegible]

in the county [illegible]

the extent [illegible]

also appears that during the [illegible] there were

constant complaints [illegible]

was so high that [illegible]

at a profit, and this was [illegible]

contract was entered into [illegible]

the operation [illegible]

Affidavit [illegible]

finding in the [illegible]

27, 1923, as [illegible]

support of [illegible]

payment [illegible]

timates [illegible]

that under [illegible]

was to be [illegible]

receive [illegible]

of the [illegible]

entitled [illegible]

refund [illegible]

[illegible]

afterthought [illegible]

reason [illegible]

testified [illegible]

be [illegible]

that [illegible]

only [illegible]

due [illegible]

refused [illegible]

[illegible]

[illegible]

we think this [illegible]

mortgage rather than the reason he now urges. Walsh testified that when he learned on January 27 that Corning was going to pay off the mortgage, he (Walsh) did not want it paid off; that he tried to get in touch with Corning to urge him not to do so; that he began to get scared that Corning "was going to run out on him"; that he knew that as long as the mortgage was in effect he could hold the goods and he felt safer with the goods in the mill. We think this was the real reason the $2200 was not credited on the mortgage. The mortgage provided that the mortgagor could sell or dispose of any of the property mortgaged upon paying to the trustee or a sum equal to the market value of such goods, or upon depositing with the trustee goods of equal value with those sold; that all goods deposited with the trustee in substitution for goods sold should be included in the mortgage. There was no provision which required the trustee to return to appellee any money paid by appellee for goods sold and shipped. Under these circumstances the $2200 was a payment on the note and mortgage and should have been so credited. When appellee tendered to the bank $7800 which was the balance due on the mortgage, appellee had a right to have the note cancelled and the mortgage released. Appellee was deprived of its rights in this regard by the wrongful act of the trustee. Even after the full amount was paid and accepted and the note was cancelled the trustee did not deliver a release of the mortgage to appellee until after the bill was filed in this case. Walsh denies that appellant demanded a release but the evidence shows otherwise. He also claims that there was an agreement not to ship, after the mortgage was paid, until after there was a settlement, but we do not think the evidence sustains this contention. On the contrary we think there was a positive refusal on the part of Walsh to allow appellee to ship any goods even after appellee had the right so to do.

There is a sharp conflict in the evidence as to every material question in issue. We have read all of the evidence with great care. The chancellor saw the witnesses and heard them testify.

Mortgage [illegible]
upon be [illegible]
mortgage, be [illegible]
in touch [illegible]
agreed that [illegible]
as long [illegible]
felt safer [illegible]
reason the [illegible]
provided [illegible]
property [illegible]
market value [illegible]
of equal [illegible]
trustee in [illegible]
mortgage. [illegible]
return to [illegible]
subject. [illegible]
note and [illegible]
tendered [illegible]
supplies [illegible]
release. [illegible]
wrongful [illegible]
and poor [illegible]
a reference [illegible]
in this [illegible]
the evidence [illegible]
agreement [illegible]
well [illegible]
contention. [illegible]
on the [illegible]
are the [illegible]
[illegible]
material [illegible]
error or. [illegible]

He was in a better position than we are to determine the weight to be given to the testimony of each witness. Much depends upon the manner in which the evidence was given and the appearance of the witnesses. We do not feel justified in setting aside the finding with reference to a breach of the contract by appellant on the grounds that the finding is against the weight of the evidence. If there was a breach as found by the decree it was a substantial one. In fact it was such as to render impossible a performance of the contract by appellee and such as to give appellee the right to rescind.

If the contract was properly rescinded the next question is as to whether either party was entitled to damages. The decree found that appellee was in default in not furnishing material of proper quantity and quality. We are not disposed to say that this finding is contrary to the evidence and for that reason appellee was not entitled to damages as prayed in the original bill. On the other hand, we are of the opinion that appellant was also in default and did not comply with its contract. We have stated the principal respects in which appellant failed to comply with its contract, and it is unnecessary to here repeat them. Because of the fact that neither party complied with the contract the decree was correct in refusing damages to either party.

A party claiming damages cannot recover unless he has performed his part of the contract, or is ready and willing to perform. Baird vs. Evans, 20 Ill. 30. Damages which are speculative, and too remote to be measured, or are impossible to ascertain, cannot be recovered. Pennsylvania Coal Co. vs. Ryan, 107 Ill. 226; Haven & White vs. Wakefield, 39 Ill. 509; Chicago, Indiana & Western Railway Co. vs. Baker, 130 Ill. App. 414. The contract provides that appellee need not strictly adhere to the amount of raw material to be furnished during periods of strikes, labor troubles, business depressions, or of decreased sales of the finished product made therefrom resulting from causes beyond the control of the appellee. There is some evidence that there were business depressions and decreased sales of the

He was in a better position [illegible] to be
be given to the [illegible]
manner in which the evidence was [illegible]
witnesses. [illegible]
with reference to the [illegible] a breach of the [illegible]
grounds that the finding in [illegible]
there was a breach as found by the decree [illegible]
In fact it was [illegible] another [illegible]
contract by expellee and such as to give [illegible]

If the contract was [illegible]
is as to what [illegible]
found that expellee was [illegible]
proper quantity and quality. [illegible]
finding is contrary to the evidence [illegible]
not entitled to [illegible]
hand, we are of [illegible]
did not comply [illegible]
respects in which [illegible]
it is unnecessary [illegible]
neither party [illegible]
refusing [illegible]

-

formed [illegible]
Baird v. [illegible]
remote to [illegible]
recovered. [illegible]
White v. [illegible]
Co. v. [illegible]
need [illegible]
during [illegible]
of deer [illegible]
time [illegible]
that there were [illegible]

finished product which were beyond the control of appellee, and therefore this fact must be taken into consideration. There is evidence not only as to the defective quality of the stock furnished by appellee, but there is also evidence as to defective manufacture of that stock by appellant. It also appears that there were various shut-downs from time to time because of repairs that were necessary to the machinery, and that other shut-downs were caused by reason of fires in the plant which caused various delays. It also appears that the price of conversion was higher than could be paid and come in competition with other factories. While it is true the contract fixed the price between the parties, yet when we take into consideration the various defaults by both parties, neither was entitled to damages, and any damages assessed would be very difficult of ascertainment and would necessarily be largely speculative. Under this state of the proofs the decree was correct in refusing damages.

We find no reversible error and the decree will be affirmed.

Decree affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Mar, in the year of our Lord one thousand nine hundred and ~~twenty-~~ six.

Justus L. Johnson
Clerk of the Appellate Court.

1579 abstract only

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On JAN 19 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

240 I.A. 679

Clyde Schooley,
Appellee,

vs.

Wilson Provision Company,
a corporation,
Appellant.

Appeal from the Circuit
Court of Peoria County.

Partlow, J.

Appellee, Clyde Schooley, recovered a judgment for $1842.55 in the circuit court of Peoria county, against appellant, Wilson Provision Company, on account of personal injuries and injuries to a truck caused by a collision with a truck belonging to appellant, and an appeal has been prosecuted to this court.

The first error urged is that the evidence does not sustain the judgment, and that appellee was guilty of contributory negligence. The declaration consisted of three counts. The first alleged general negligence, the second charged a high and dangerous rate of speed, and the third alleged that appellee had the right of way which right was violated by appellant.

The evidence shows that the accident occurred on August 12, 1924, about ten o'clock in the morning of a clear bright day, at the intersection of Main street and Garfield avenue, in the city of Peoria. Main street extends east and west, and Garfield avenue extends north and south. There is a double street-car track in Main street and the street is forty and one-half feet wide. The distance from the south curb line to the first rail of the street car track is about twelve feet. The width of Garfield avenue is about thirty feet. Appellee at the time of the accident was thirty three years old, and was engaged in concrete work. About twenty years prior to this accident he lost a leg, and used an artificial limb. He was operating a one ton Cheverlet truck, with an enclosed cab, having a glass wind shield and glass doors which were closed. He

Clyde Sol[illegible],
[illegible],

vs.

Wilson Iro[illegible]
a corporation,
[illegible].

Perlow, J.

[illegible]

in the circuit court [illegible]
Provision Company, [illegible]
a truck owned by [illegible]
and an appeal [illegible]

[illegible]

the judgment, and that [illegible]
The decision [illegible]
negligence, the [illegible]
and the third alleged that [illegible]
was violated by [illegible].

The [illegible]
12, 1924, about [illegible]
the intersection [illegible]
Peoria. M in [illegible]
extends north and south. [illegible]
Main street [illegible]
distance [illegible]
car track [illegible]
about three [illegible]
three years old, [illegible]
prior to the [illegible]
He was [illegible]
having a place [illegible]

was driving north on Garfield avenue. He testified that as he approached the intersection he practically stopped. He looked west before he reached the south sidewalk line of Main street and could see practically to the end of the block west. He then looked east. He put his car in second and started across the intersection. He was looking straight ahead as he moved into the intersection. As the front wheels of his truck reached the second street car rail his truck was hit on the west side. At the time he crossed the intersection he was traveling six or eight miles per hour. He did not see appellant's truck before the collision. The truck which struck him was a White truck loaded with meat and weighed 6900 pounds.

Three disinterested eye witnesses testified for appellee. Two of them testified that appellee was traveling eight to ten miles per hour; that he slowed down for the crossing; that appellant's truck was going thirty to forty miles per hour; that it did not slacken speed and gave no alarm or warning signal of any kind; that appellee's truck was knocked thirty or forty feet. The third witness for appellee testified that when appellee reached the intersection he was going five to ten miles per hour.

Harlon the driver of appellant's truck testified that as he approached the intersection his truck was going fifteen or eighteen miles per hour and was straddling the south car track. He looked first to the south, then to the north and then back south. When he looked south the second time he was eight feet into the intersection east of the curb. At that time appellee was on the south sidewalk line of Main street, about five to eight feet west of the east curb; that appellee's truck was going twenty four to twenty eight miles per hour; that appellant's truck turned slightly to the north and appellee turned slightly to the east, and the left front wheel of appellee's truck struck the right side of appellant's truck just back of the right front wheel, causing appellant's truck to swerve in a northwesterly direction and run into a pole at the northwest corner of the intersection.

was driving [illegible]
approached [illegible]
before he reached [illegible]
see practically [illegible]
He put his car in [illegible]
was looking straight [illegible]
the front [illegible]
his truck [illegible]
intersection [illegible]
not see [illegible]
struck his [illegible]

Three lights [illegible]

Two of them testified [illegible]
per hour [illegible]
truck was [illegible]
slacken speed [illegible]
Spellee's truck [illegible]
for Spellee [illegible]
he was [illegible]

[illegible]

as he approached [illegible]
eighteen [illegible]
He looked [illegible]
When he looked [illegible]
intersection [illegible]
south sidewalk [illegible]
of the east [illegible]
twenty [illegible]
to the [illegible]
front [illegible]
truck just [illegible]
to carry [illegible]
northwest corner of [illegible]

Jones, a boy who was riding with Harlon testified practically the same as Harlon. He testified that appellant's truck was traveling fifteen to twenty miles an hour, and that it was one-third of the way across the intersection before appellee's truck reached the intersection; that appellee was traveling twenty five to thirty miles per hour.

Section 33 of the Motor Vehicle Act, provides that all vehicles traveling upon public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and shall have the right of way over those approaching from the left. Under this statute appellee not only had the right of way, but the preponderance of the evidence shows that he reached the intersection before appellant's truck. It was therefore the duty of appellant's driver to stop his truck, or to sufficiently check its speed to allow appellee to pass. As a general rule the violation of a statute is negligence per se, and if the negligence contributes to, or causes, the injury it is actionable as a matter of law. Lenartz vs. Funk, 224 Ill. App. 180; Partridge vs. Eberstein, 225 Ill. App. 209. Not only did appellee have the right of way and reach the intersection first but the preponderance of the evidence shows that he was traveling at a reasonable rate of speed; that he slowed down as he reached the intersection; that he looked both ways before he attempted to cross. On the other hand, the preponderance of the evidence shows that appellant's truck was traveling at an excessive rate of speed; that it gave no alarm or warning; that it did not slacken its speed, and that it ran into the truck of appellee. The preponderance of the evidence establishes a clear case against appellant on each and all counts of the declaration, shows that appellee was in the exercise of due care and caution for his own safety, and that he was not guilty of contributory negligence which barred his right to recover.

It is insisted that the damages are excessive for the reason that appellee and his truck were not seriously injured. The

Jones, [illegible]

tically the same [illegible]

was travelling [illegible]

one-third of the [illegible]

truck reached the intersection, [illegible]

five to thirty miles per hour.

Section [illegible] of the [illegible]

vehicles [illegible]

to other vehicles [illegible]

right, and at [illegible]

the left. [illegible]

but the presence of the evidence [illegible]

intersection before [illegible]

of appellant's [illegible]

its speed to allow [illegible]

of a statute [illegible]

to, or cause, the injury [illegible]

Lonsdale vs. [illegible]

Ill. App. 179. [illegible]

the intersection [illegible]

that he was [illegible]

down as he [illegible]

before he [illegible]

of the evidence [illegible]

excessive rate of speed; [illegible]

did not slacken its speed, [illegible]

The proximal [illegible]

appellee [illegible]

safety, and [illegible]

barred his right to recover.

It is [illegible]

reason that [illegible]

evidence on behalf of appellee shows that he was rendered unconscious. He was taken to a hospital where he remained about two hours and then was taken to his home at his own request. He remained at home about thirty two days and was confined to his bed about twelve days. He testified he had a cut on the left arm, to the bone, about three or four inches long, which it took three stitches to close. His ribs were broken on the left side. The skin on the right shoulder was torn about two inches. His back, side, and one leg were bruised. The brace on the artificial limb was bent in a V shape and bruised the bone. His hips were skinned, and they were black and blue. His chest was sore. He testified he had pains on his left side at the time of the trial; that at night he was restless and could not sleep; that he had pains for thirty days after the accident mostly in the side; that he was bandaged for three weeks; that he has headaches at the present time; that for forty days he could do no work, and for forty more days he was able to work half time; that he was earning $13.50 per day, which he lost for forty days, and $6.75 which he lost for forty days. He testified he paid 62.00 for doctor, hospital, and X-Ray bills, making a total actual loss of $872.00, to say nothing of his pain and suffering.

As to the injury to the car, the evidence on behalf of appellee shows that his truck was practically new. It had been driven about two months for a distance of 700 or 800 miles, and was worth $950.00. The frame was bent into a V shape and had to be replaced. The starter, starter plate, the differential and transmission were broken. The drive shaft housing was cracked and the drive shaft was bent. The transmission was cracked on both sides. The engine was knocked out of line about four inches. The cab was broken from the box and was knocked off. One front wheel was broken and two tires were flat. The axle was bent, the battery was broken, brake rods were bent, and the gear shaft was knocked loose from the transmission; that no part of the truck escaped injury but the back

evidence on [illegible]
He was taken to [illegible]
then was [illegible]
about thirty [illegible] and was [illegible]
He testified [illegible]
or four inch[illegible]
ribs were [illegible]
was torn [illegible]
The bruise [illegible]
the bones [illegible]
His chest [illegible]
at the time [illegible]
not alone; [illegible]
mostly in [illegible]
has produce[illegible]
no work, [illegible]
he was [illegible]
$6.75 wh[illegible]
doctor, [illegible]
of $72.00, [illegible]

appellee [illegible]
driven about [illegible]
was work[illegible]
be reduce[illegible]
treatment [illegible]
the trial [illegible]
The [illegible]
bruis[illegible]
and [illegible]
bruise [illegible]
temporarily [illegible]

wheels, springs, radiator, and winds ield. Appellee and two experienced repair men testified that the truck could not be repaired, that it would cost more to repair it than it was worth, that after the accident it was worth from $50.00 to $75.00.

On the other hand, the evidence on behalf of appellant was that the truck was under a chattel mortgage to the American Bankers Company, and after the accident was repaired, as good as new, for $189.06. The contract price for the repairs was $250.0 . The evidence shows that this garage did considerable repair work for the American Bankers Company and did so at a flat rate, that is, it charged a certain stated price for a job regardless of the amount of time or material which it took to do it, and that it also gave to the American Bankers Company a cash discount. It was admitted that the usual price for making such repairs was 1.50 per hour for the labor, together with the cost of the material. For example, the bill, which is itemized, shows that $10.00 was charged for making the repairs on the cab, but it also appears that it took 13½ hours to make the repairs on the cab, which at $1.50 per hour, would amount to $20.25, which was over double the amount charged in the itemized statement. The same condition existed as to other items of repair, The evidence also shows that after the truck was repaired it was sold for about $500.00. If it was originally worth $950.00 and it cost $189.06 to repair it, and it was sold for about $500.00, there was a loss of $639.06, which amount added to the $872.00 actual damages to appellee for personal injuries made a total of $1511.06 actual damages proven, which were within $331.49 of the amount of the judgment. The case was tried upon the theory of appellee that the damages could not be repaired, and upon the theory of appellant that they were repaired. Regardless of whichever theory the jury saw fit to adopt, the damages assessed were not against the weight of the evidence when the personal suffering of appellee was taken into account, and the judgment should not be reversed because

wheels, axles, [illegible]
experienced no difficulty [illegible]
repaired, that it [illegible]
that after the [illegible]

On the other hand, the evidence [illegible]
was that the [illegible]
San Jose Company, [illegible]
new, for $181.00. [illegible]
The evidence showed that [illegible]
for the American company [illegible]
it charged a certain [illegible]
of time or material [illegible]
to the American [illegible]
that the usual price [illegible]
the labor, [illegible] material. [illegible]
the bill, which is itemized, [illegible]
the repairs [illegible]
to make the repairs [illegible]
to $20.22, [illegible]
statement. [illegible]
The evidence [illegible]
sold for [illegible]
it cost [illegible]
there was [illegible]
actual damage [illegible]
$181.00 [illegible]
amount of [illegible]
arrelles [illegible]
of complaint [illegible]
the jury [illegible]
weight of [illegible]
[illegible]

the damages are excessive.

The last thing before appellant closed its case it offered in evidence a written statement made by appellee after the accident. After appellant closed its case appellee was immediately called in rebuttal and was asked under what circumstances he signed the statement which had been offered in evidence, and to whom he had been talking before he signed it. He replied, "I do not know who this man was. I was in the Inter-Ocean Insurance Company's office." Appellant objected to the answer and the objection was sustained. Appellant asked leave to withdraw a juror and continue the case. The motion was argued out of the presence of the jury and was overruled. During the argument to the jury, a statement was made by counsel for appellee which was objected to. Counsel for appellee then said: "I was arguing about repairing the automobile truck, and that after it was taken by the insurance company -I mean banking - the American Banking Company, which was referred to, I was interrupted in my argument." Appellant objected to appellee making any statement about an insurance company, that there was no insurance company involved, and that the statement was prejudicial. Counsel for appellee replied that he wanted to state to the court and jury that it appeared, under the evidence, that the car was taken back by some banking company, and that it was to that which he referred, and to that only, and that he had no reference to anything or anybody else.

It is insisted by appellant that these two remarks were an attempt on the part of appellee to get before the jury the fact that there might be an insurance company interested in the case; that such attempts constituted reversible error, and the judgment should be reversed. It has uniformly been held that any reference to an insurance company is improper. It has not, however, been held in all cases that the admission of such evidence constitutes reversible error. An examination of the authorities will show that where judgments have been reversed, usually other errors were committed, or

the damages are excessive.

The last trial court [illegible] allowed [illegible] in evidence a written statement made by appellee [illegible]. After appellant closed its case appellee was [illegible] rebutted and was asked under what circumstances he signed [illegible] statement which had been offered in evidence, and [illegible] been talking before he signed it. In reply, [illegible] this man was. I was in the Inter-Ocean [illegible]. Appellant objected to the answer and the objection was sustained. Appellant asked leave to withdraw a juror and continue the case. The motion was denied but [illegible] ruled. During the examination by the juror, a statement [illegible] counsel for appellee which [illegible] then said: "I was trying [illegible] that after it was taken by the insurance company [illegible] the American Banking Company, [illegible] in my argument." [illegible] about an insurance company, [illegible] involved, [illegible] appellee rested [illegible] it appeared. Under the evidence, [illegible] banking company, and [illegible] that only. [illegible]

It is [illegible] an attempt on the part of appellee [illegible] that there is [illegible] that such [illegible] should be reversed. [illegible] to an insurance company [illegible] in all cases the [illegible] error. An examination of the entire [illegible] merits be [illegible]

the case was close on the facts and the damages were large, or that counsel persisted in their attempt to present this question to the jury after objections had been sustained. In Mithen vs. Jeffery, 259 Ill. 372, it was held that the matters complained of have not always been considered grounds for reversing a judgment. In the following cases there were other errors which contributed to the reversal: McCarthy vs. Spring Valley Coal Co., 232 Ill. 473; Purcell vs. Degenhardt, 202 Ill. App. 611; Nonblatt vs. Young, 199 Ill. App. 312; Wiersema vs. Lockwood, 147 Ill. App. 33; Turner vs. Lovington Coal Mining Co., 156 Ill. App. 60; Emery Dry Goods Co. vs. DeHart, 130 Ill. App. 244; Hofer vs. Chicago, Burlington and Quincy Railroad Co., No. 7437, not reported, the opinion being filed in this court May 18, 1925. In El Dorado Coal and Coke Co. vs. Swann, 227 Ill. 586; Altitus vs. Spring Valley Coal Co., 246 Ill. 32, and Kenney vs. Marquette Co., 243 Ill. 396, it was held that the admission of evidence of this kind was not sufficient under the facts to reverse the judgment.

In the case at bar we do not think there was any intent on the part of counsel for appellee to violate this rule, or to get improper evidence before the jury. Appellee was not asked about any insurance company. He was merely asked with reference to the person to whom he had been talking when the written statement was made, and he volunteered the answer to which objection is made. In the second instance, we are convinced that the statement to which objection was made was the mere slip of the tongue, and counsel really intended to say the American Banking Company instead of insurance company. Appellant insists this error should work a reversal because the evidence is close and the verdict is excessive. We do not agree with either of these contentions. We have held that the evidence was not close and that the judgment was not excessive. We do not think the remarks were sufficient to justify a reversal.

the case was close on the [illegible]

counsel [illegible] in [illegible] t [illegible]

jury after [illegible]

259 Ill. 279, [illegible]

always b en considered [illegible]

following cases [illegible]

reversal: [illegible]

Purcell va. [illegible] Ill; [illegible]

Ill. App. 712; [illegible]

Lovington [illegible] 166 Ill. [illegible];

va. DeBar, [illegible]

Quincy Railro [illegible]

filed in this [illegible]

va. Swann, [illegible]

Ill. 38, and [illegible] va. [illegible]

that the [illegible]

the facts [illegible]

In [illegible]

on the part [illegible]

get [illegible]

any [illegible]

[illegible]

made, [illegible]

the [illegible]

objection [illegible]

read [illegible]

insurance [illegible]

reversal [illegible]

We [illegible]

[illegible]

We [illegible]

The twelfth instruction given by the court of its own motion was as to the measure of damages, first, in case the truck could be repaired, and second, in case it could not be repaired. Objection is made to this instruction on the ground that the evidence shows that the truck was repaired, therefore no instruction should have been given on the theory that the truck was so badly damaged that it could not be repaired. Appellee had a right to present his theory of the case. On the other hand appellant tried the case upon the theory that the truck had been repaired. It was a question for the jury to say what damages should be allowed. The twelfth instruction announced the correct rule under both theories. Crossen vs. Chicago & Joliet Electric Railroad Co., 158 Ill. App. 42; Latham vs. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 164 Ill. App. 559; Koch vs. Pearson, 219 Ill. App. 468; McNamara vs. Nelson, No. 7445, decided by this court and not reported. There was no error in giving this instruction.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

The twelfth instruction [illegible] by the [illegible]
motion was as to the [illegible] theory. First, [illegible]
could be required, [illegible] in [illegible] case.
Objection is made to said instruction [illegible] that it [illegible]
shows that the truck [illegible] required, the [illegible]
have been given on the [illegible] that the [illegible]
that it could not be required. [illegible]
theory of the case. [illegible]
the theory that the [illegible]
the jury to say that [illegible]
announced the correct rule under [illegible]
& Joliet Electric Railroad Co., 159 Ill. App. 48; [illegible]
Cleveland, Cincinnati, [illegible] Ry. Co. [illegible]
589; Koon v. [illegible], 115 Ill. App. 408; [illegible]
7445, decided by this court and not reported. [illegible]
in giving this instruction.

We find no [illegible]

affirmed.

[illegible]

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 7th day of Mar, in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

Abstract only

Rehearing Denied
April 7, 1926.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of October, in the year of our Lord one thousand nine hundred and twenty-five, within and for the Second District of the State of Illinois:

Present--The Hon. NORMAN L. JONES, Presiding Justice.
Hon. AUGUSTUS A. PARTLOW, Justice.
Hon. THOMAS M. JETT, Justice.
JUSTUS L. JOHNSON, Clerk.
E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On FEB 3 - 1926 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

Samuel A. Gibson,

appellee,

vs.

Calvin R. Mower,

appellant,

Appeal from the Circuit Court

of Winnebago County.

240 I.A. 679

Partlow, J.

Appellee, Samuel A. Gibson, obtained a judgment for 2000 against appellant, Calvin R. Mower, in the circuit court of Winnebago county, as a commission for the sale of stock under a verbal contract, and an appeal has been prosecuted to this court.

The suit was originally against appellant and his wife Annie P. Mower. The declaration consisted of the common counts, and a special count which alleged that appellee at the verbal request of appellant procured for appellant, a purchaser for the stock of appellant in the Rockford Sand & Gravel Company, at $40,000 par value and that appellant refused to pay appellee the $2000 agreed upon. The general issue was filed. At the close of the evidence on behalf of appellee, and at the close of all of the evidence, a motion was made to direct a verdict in favor of appellants, which motions were overruled. After a verdict had been returned against both defendants, a motion for a new trial was made. Appellee was granted leave to file an amended declaration which was against appellant alone, and consisted of the common counts, and a special count substantially the same as the declaration on which the case was tried. The original plea was ordered to stand as the plea to the last declaration. The motion of appellant for a new trial was overruled, and judgment was entered against appellant.

The evidence shows that the Rockford Sand & Gravel Company was a corporation doing a general sand and gravel business near the city of Rockford. Its stock consisted of 800 shares of which appellant owned 10, his wife 390, and appellee and B. A. Knight had 200 shares each. On May 6, 1922, appellant and his wife gave to B. A. Knight a written option as follows: "In the event you, or your order, exercise your option, bearing date May 6, 1922, for the purchase of our $40000 par

7581 October Term, 19[illegible]

Samuel A. Gibson,

appellee,

vs.

Calvin E. Mower,

appellant.

Partlow, J.

Appellee, Samuel A. Gibson, obtained a judgment [illegible] appellant, Calvin E. Mower, [illegible] as a commission for the sale [illegible] appeal has been presented to this court.

The suit was originally [illegible] Mower. The declaration consisted [illegible] count which alleged that appellee [illegible] procured for appellant, [illegible] Rockford Sand & Gravel Company, [illegible] refused to pay appellee the [illegible] filed. At the close of the evidence [illegible] close of all of the evidence, a motion was made [illegible] favor of appellants, which motion was [illegible] been returned [illegible] made. Appellee [illegible] was against appellant [illegible] special count [illegible] case was tried. [illegible] the last declaration. [illegible] ruled, and [illegible]

The evidence [illegible] corporation [illegible] Rockford. [illegible] 10, his wife [illegible] On May 6, 1920, [illegible] option as follows: [illegible] option, bearing date [illegible]

value of the Capital Stock of the Rockford Sand and Gravel Company, we hereby agree to pay you a commission of five per cent for services in making such sale." On May 11, 1922, this option was assigned by Knight to appellee, and was later extended on June 6, to September 5. On September 5, 1922, appellant and wife gave a similar option in almost the identical language to appellee, which option was to expire on November 5, 1922. During the time these options were in force, appellee made several unsuccessful attempts to sell the stock. Finally a plan was formulated for the consolidation of the Rockford Sand & Gravel Company, the Carrico Stone Company, and Hart & Page Company, under the name of the Northern Illinois Supply Company. By this plan the stock of appellant and his wife was to be purchased. During the formation of these plans appellant represented the Rockford Sand & Gravel Company, Fred Carrico represented the Carrico Company, and Hart & Page represented their organization. The plan was not perfected by November 5, the date the written option expired. Prior to the expiration of the written option, appellee had a talk with appellant in which he informed him that it would be impossible to complete the consolidation before the date upon which the option expired, and appellee requested appellant to extend the option, or give him a new one. Appellant refused to give a further written option, but appellee testified that after appellant refused to give a written option, appellant said: "Bring on your money and I'll pay your commission if you carry the deal through." This conversation was in the presence of Frank R. Larson, a bookkeeper in the employ of appellee, who testified to substantially the same conversation as related by appellee. Appellant denies that any such conversation took place, and this is the conversation upon which the right of recovery is based. If the jury believed the testimony of appellant and Larson, and did not believe the testimony of appellee, then they were justified in finding that there was such a verbal contract between appellant and appellee.

It is contended by appellant that during the negotiations for the sale of this stock after November 5, he represented himself and his wife, and appellee was not his agent, and for that reason there can be no recovery. The evidence shows that on January 6, 1923, a meeting was held at the office

value of the [illegible]
merely agree to pay [illegible] consideration of [illegible]
making such [illegible]
to appellee, [illegible]
ber 8, 1922, [illegible]
tical [illegible]
During the [illegible]
cessful attempts [illegible]
consolidation of [illegible]
Company, and [illegible]
Supply Company. [illegible]
be purchased. [illegible]
the Rockford [illegible]
Company, [illegible]
perfected by [illegible]
the amalgamation [illegible]
in which he [illegible]
solidation [illegible]
quested appellant to [illegible]
refused to give [illegible]
after appellant [illegible]
on your money [illegible]
This conversation [illegible]
the amalgamation [illegible]
tion as related [illegible]
took place, [illegible]
is based. [illegible]
did not believe [illegible]
finding that [illegible]
It is contended by [illegible]
of the court [illegible]
appellee was [illegible]
The evidence [illegible]

of the Rockford Sand & Gravel Company at which appellant, appellee, Hart, Carrico, Knight, and Larson were present, and a tentative agreement was drawn up for the sale of the Mower stock, but the agreement was not signed at that time. On February 19, 1923, another meeting was held and a tentative agreement was drawn up and executed by which the stock of appellant and his wife was purchased. It appears that at one of these meetings Mrs. Mower was present, but there is some uncertainty as to which meeting it was. Within the time provided in the written agreement, appellant and his wife received $40,000 for their stock, together with interest from November 1, 1922, to the date of payment. The Northern Illinois Supply Company was formed from all of the stock purchased, and appellee received stock of the consolidated enterprise for the services which he performed in perfecting the consolidation. Appellee demanded of appellant the $2000, which he claimed was due for the sale of his stock. Appellant refused to pay, and this suit was brought.

The first error urged is that the court should have directed a verdict at the close of appellee's evidence for the reason that the declaration charged a joint liability and the evidence failed to show a joint liability; that at the close of all of the evidence the motion to direct a verdict should have been allowed because the evidence showed that appellee was acting in a dual capacity as agent for both parties and for this reason could not recover; that the instructions, verdict, and motion for a new trial were on the theory of a joint liability; that under the facts the jury was called upon to decide whether there was a joint liability, or no liability at all; that the court by permitting an amendment to be made to the declaration after verdict, changed the liability from a joint to a several liability, and substituted the judgment of the court for the finding of the jury.

Section 39, of the Practice Act provides that at any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter either

of the [illegible]
Carlos, Light, [illegible]
drawn up for the [illegible]
at that time. [illegible]
tative [illegible]
lant and his [illegible]
imps Mrs. [illegible]
meeting it [illegible]
lant and his [illegible]
ast from November 1, [illegible]
Supply Company, [illegible]
received about [illegible]
performed in [illegible]
the $2000, [illegible]
refused to pay, [illegible]

The first error [illegible]
dict at the close of [illegible]
tion charged a joint [illegible]
liability; that [illegible]
a verdict should [illegible]
appellee was [illegible]
this reason [illegible]
motion for [illegible]
under the [illegible]
joint liability, [illegible]
an amount [illegible]
liability [illegible]
ment of [illegible]
[illegible]
final [illegible]
as [illegible]
to plaintiff [illegible]
joint defendant, [illegible]

of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought. Under this Section it has been held that where a verdict is rendered against two defendants, there may be a dismissal as to one and the entry of a judgment against the other. Kasper v. People, 230 Ill. 342; Bauer v. Rusetos & Co., 225 Ill. App. 27; Posvic v. Harford, 211 Ill. App. 273; Marcinkevich v. Wilson, 183 Ill. App. 147.

At the close of all of the evidence even if the court might properly have directed a verdict upon the ground that the declaration charged a joint liability and the evidence showed a several liability, neither appellant nor his wife was injured thereby. The wife is in no position to complain for the reason that the filing of the amended declaration, after verdict, was in effect a dismissal of the suit as to her. She is not a party to this appeal, and the subsequent action of the court was in her favor. If the evidence showed a several liability as to the appellant, and the declaration charged a joint liability against him and his wife, then under the statute, appellee had a right, after verdict, to amend the declaration and take judgment against appellant alone.

The question of a dual agency, if there was one, did not arise for the first time after appellee closed his evidence and before all the evidence was closed as is claimed by appellant. All of the facts relative to the transaction were known to appellant on the day the stock was paid for, which was many months before the suit was begun and tried, and therefore he was not taken by surprise by the amendment of the declaration. We do not think the appellant is in any position to complain that the court refused to direct a verdict, or that the declaration was subsequently amended, and that he alone was held liable.

It is insisted that there was a dual agency which prevented appellee from a recovery; that appellee was the agent of appellant and demanded compensation therefor; that the evidence shows he was also the agent of Garrico, Hart and Page; that they gave him stock for his services in promoting the consolidation, and they did not know he was the representative of appellant.

of [illegible] enable the plaintiff to [illegible] was intended to be [illegible] where a verdict is [illegible] missed as to [illegible] v. People, 220 Ill. [illegible]; [illegible] v. Harford, 211 Ill. [illegible] 27; [illegible]

At the close of all [illegible] have directed a verdict upon the [illegible] joint liability, and the evidence showed a [illegible] appellant nor his wife was injured [illegible] to complain for the [illegible] after verdict, was in effect a dismissal [illegible] not a party to the [illegible] her favor. If the evidence [illegible] lant, and the [illegible] wife, then under the [illegible] amend the description [illegible]

The question of [illegible] the first time after [illegible] evidence was closed [illegible] tive to the [illegible] was paid for, which was [illegible] and therefore [illegible] ration. We do not think [illegible] that [illegible] subsequently [illegible]

It is [illegible] from a [illegible] commencement [illegible] derive, but [illegible] promotion [illegible] tive of appellant.

It is a well established general rule of law that a broker cannot be the agent of both the buyer and the seller. arrick v. Smith, 137 Ill. 504; Young v. Trainor, 158 Ill. 428; Hafner v. Herron, 165 Ill. 242. This rule is based upon the well known fact that an agent cannot serve two masters. It is the duty of the agent to obtain the best possible price and terms for his principal and he cannot do so if he is trying to serve both parties. He is chargeable with the utmost loyalty and good faith in his dealings. There are, however, exceptions to the rule that he cannot receive compensation from both. A broker, having no discretion, and not being required to use any endeavor to get for his principal anything but the price fixed by his principal, and there being no duty upon him to do aught save one authorized thing, it has been held that his agency involved no duty but to secure a sale upon the terms as fixed, and having performed this duty he is entitled to his compensation, although he may have also served the purchaser. O'Neill v. Sinclair, 54 Ill. App. 298; Jones v. Missouri Lumber Co., 166 Ill. App. 266; Mechem on Agency, Sec. 973. Under such circumstances, the broker is regarded only as a middleman.

The two written options show that the employment of appellee was not the usual employment where property is placed in the hands of an agent for sale. The language of the options is "in the event that you, or your order, exercise your option" for the purchase of our $40000 par value, we agree to pay you a commission of five per cent. These contracts were options which appellant gave appellee to purchase at a fixed price within a given time. The price was fixed by appellant and he received the price as fixed by him. Appellee was under no obligations to appellant to secure a better price. It made no difference to appellant who purchased the stock, or for what purpose it was purchased. All appellant was interested in was the price. The only duty imposed on appellee was to exercise the option within the time fixed and pay the amount specified, both of which were done, and thereupon appellee became entitled to his commission.

Even if it be conceded that appellee was the agent of both the

[illegible]

[illegible]

Ill. 604; Young [illegible]

This rule is [illegible]

two matters. It [illegible]

price and terms for his [illegible]

to serve both [illegible]

good faith in his dealings [illegible]

that he cannot receive commission [illegible]

discretion, and [illegible]

principal [illegible]

no duty upon him to [illegible]

held that his agency involves no [illegible]

terms as fixed, [illegible]

commencement, although [illegible]

v. Kimball, 54 Ill. App. 446; [illegible]

App. 866; Hooper on [illegible]

broker is regarded only [illegible]

The two [illegible]

not the [illegible]

agent for sale. [illegible]

or your order, [illegible]

par value, [illegible]

contracts [illegible]

fixed price [illegible]

he receive [illegible]

to specify [illegible]

last [illegible]

All [illegible]

on specific [illegible]

amount specified, [illegible]

applies to his [illegible]

[illegible] to concerned [illegible]

buyer and the seller, we do not think the action can be defeated on the grounds of a dual agency. A broker can collect a commission from both parties with their knowledge and consent, or with such knowledge coupled with proof of facts and circumstances from which consent may be reasonably inferred. Keach v. Bunn, 116 Ill. App. 397. It appears from the evidence that there were numerous conversations between appellee and appellant with reference to the consolidation of these corporations. Appellant was fully aware of the steps taken by appellee to form this new corporation. He knew who were to be the purchasers of the stock and the purpose for which it was being purchased. He was aware of these facts at the time the verbal contract was made. He claims he did not know that his stock was being purchased for these promoters for the benefit of the new corporation, but we do not think this contention is sustained by the evidence. On the other hand the evidence shows that appellee was one of the promoters engaged in forming this new corporation. He was working for himself and his associates. It was known to the promoters that the stock of appellant was to be purchased and that appellee was to purchase it. The mere fact that appellee received stock for his services in promoting the corporation was not sufficient to deprive him of his commission. The agency was with the knowledge and consent of all parties and for this reason appellee was entitled to his commission.

Complaint is made of each instruction given on behalf of appellee. It will be impossible within the reasonable limits of an opinion to pass upon each of these objections in detail. We have examined each objection and find that each instruction can be sustained upon authority and has been approved by decisions of the Supreme and Appellate courts. The instructions as given were applicable to appellant and his wife, but they were each of them equally applicable to appellant if the suit had been against him alone. From an examination of all of the instructions we are of the opinion that they fully presented every rule of law applicable to the facts, and that there was no error in any instruction given for appellee.

We find no reversible error and the judgment will be affirmed.

Judgment affirmed.

STATE OF ILLINOIS, } ss.
SECOND DISTRICT.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this 9th day of April in the year of our Lord one thousand nine hundred and twenty-six.

Justus L. Johnson
Clerk of the Appellate Court.

3012

General No. 7847 OCTOBER TERM, 1925. Agenda No. 22

Thomas E. Cockin, Appellant.
vs.
Charles M. Strawn, Appellee.

Charles M. Strawn, Appellee.
vs.
Thomas E. Cockin, Appellant,

240 I.A. 680

Consolidated Case.

Appeal from Morgan.

Niehaus, PJ.

The appellee, Charles M. Strawn, brought this suit in assumpsit to recover from the appellant, Thomas E. Cockin, as an endorser the amount of principal and interest a promissory note dated June 15, 1922, made by C. P. Hudson and Sarah J. Hudson, his wife, payable to the order of Charles Dolan three years after date, for the sum of $15000.00; interest at the rate of 6% per annum. The note is secured by a mortgage on real estate in Cameron county, Texas. The mortgage contains a provision, that in case default is made in the payment of the interest on the note when due, and the default continues for ten days, then at the election of the mortgagee or his assigns, the whole debt and interest to become due and collectible at once; and that the mortgage might be foreclosed in the same manner, and with the same effect, as if the indebtedness had matured.

The declaration filed in the case averred, that the note although not due by its terms, had become due and payable by reason of this provision in the mortgage, and the failure to pay the interest which had become due and payable prior to the institution of the suit; and that the assignee of the note and mortgage had exercised the privilege contained in the provision of the mortgage referred to, and declared the whole debt due and payable. The appellant filed a general and special demurrer to

the declaration, one of the ground being that the note was not due by its terms, and that the suit therefore was premature. The demurrer was overruled. Appellant thereupon pleaded non-assumpsit, and two special pleas alleging that the endorsement and delivery of the note were obtained by fraud and circumvention, and that the endorsement on the note was without a good and valuable consideration therefor. Thereafter the appellant filed a bill in equity praying, that the endorsement and assignment of the promissory note referred to, and the contract made in connection therewith between the appellant and the appellee, be cancelled and annulled; and seeking to enjoin the prosecution of the suit at law; and enjoining the selling or assigning or transferring of the promissory note; and other relief. The bill was afterwards amended; and in the amended bill it is charged, that the appellant on or about the 20th day of September, 1922, was the owner of an equity in land located in the state of Minnesota, which had an estimated value of $5000.00; and that he placed the matter of the sale or trade of his interest in the land in question in the hands of one J. Walton Ward, a real estate broker; that he had followed the business of farming throughout his life until recent years; that his education was very limited, and that he was wholly inexperienced in matters of business outside of the occupation which he had followed; and therefore relied in the matter of the sale or trade of his interest in the Minnesota land upon the guidance and instructions of Ward; that he employed Ward to find a purchaser for his interest in the Minnesota land at such a price as would net to the appellant the sum of $5000.00; and that it was agreed, that Ward as compensation for his work should have all that he might obtain for the Minnesota land in excess of that sum; that afterwards Ward came to the appellant, and informed him, that he had in mind a note for $15000.00, which he could get hold of in exchange, by various transfers, to exchange for the Minnesota land;

and also informed the appellant, that the appellee, Charles M. Strawn, was the owner of certain land in Calhoun county, which was subject to a mortgage, but that the equity in the land, was worth not less than $20000.00; and that he had a purchaser in view, who would buy the Calhoun county land at substantially $20000.00 above the mortgage indebtedness thereon; that appellant relying upon these representations made by Ward, agreed with Ward to exchange his interest in the Minnesota land for the $15000.00 note; but upon the express condition, that the trade would be so handled there should be no personal responsibility on the part of the appellant. That Ward thereupon took the appellant to the appellee, who was the owner of the equity in the Calhoun county land; and who represented, that it was worth more than $15000.00 over and above the mortgage thereon; and that thereupon Ward informed appellant, that he could trade the Minnesota land to C. H. Dolan for a note which said Dolan held signed by C. T. Hudson and wife for $15000.00, which note was secured by mortgage on certain land in the state of Texas; and that the security furnished by the mortgage on the Texas land was ample security, and made the $15000.00 note perfectly good. The bill avers, that the appellant was not familiar with the Texas land; knew nothing about its value, and relied solely upon the representations made by Ward in reference thereto; and that thereupon agreed, that he would transfer the Minnesota land to Dolan for the note of $15000.00 secured by the mortgage on the Texas land; and did thereupon make such exchange; but that afterwards he ascertained the fact, that the mortgage on the Texas land was a second mortgage, and subject to a prior mortgage in favor of one H. C. Lippert; and that the principal and interest of this prior mortgage amounted to more than $10000.00, which was more than the land was worth; and that in truth and in fact the $15000.00 note and mortgage was worthless; all of which was known to Ward at the time he was advising appellant to make the exchange and trade referred to. The bill also avers, that the

appellant ascertained the fact, that Ward and the appellee had colluded together in making the exchange; and that Ward was in fact in the employ, and was the agent of the appellee, for the purpose of disposing of the equity, which he owned in the Calhoun county land; and that they had colluded together for the purpose of cheating and defrauding appellant. The bill also avers, that after the appellant had made the exchange of his Minnesota land for the $15000.00 note and mortgage, Ward took the appellant immediately to the appellee, and insisted that appellant endorse the note for $15000.00 to the appellee. That Ward first went with appellant to the store of C. H. Dolan, and took the deed of appellant for the Minnesota land to Dolan, and delivered it to him at his store, and immediately returned with the note and mortgage on the Texas land signed by appellant; and that thereupon immediately drove to the office of the appellee; and that by the direction of Ward he made the trade of the $15000.00 note and mortgage; and at that time endorsed the note and delivered it to appellee; and that the mortgage was assigned to appellee in accordance with the terms of their agreement; and that their agreement to trade and exchange was reduced to writing. The bill also avers, that the transaction referred to, and all the transactions connected therewith, was a scheme and device on the part of Ward and the appellee, to get his unqualified endorsement upon the $15000.00 note for the purpose of holding him liable as an endorser of the note. The bill also avers, that the written agreement or contract which contains the terms upon which the trade between appellant and appellee was made, provide, that the appellee, as a condition precedent to the making of the trade, was to furnish the appellant an abstract showing merchantable title in the appellee on the Calhoun county land; and that the abstract which was furnished under the agreement, does not show such merchantable title. The bill also avers, that at and before the time of the signing of the agreement for the trade and

exchange referred to, and the delivery of the $15000.00 note, that the appellee assured appellant that his equity in the real estate in Calhoun county was worth more than $15000.00; that the appellant was wholly unfamiliar with the Calhoun county land, and had never seen the same, and had no information with reference to its value, and relied solely upon the representations of the appellee and Ward touching the value of the same; but states the fact to be that there is a mortgage upon the Calhoun county land for $10800.00, with accumulated interest thereon, and that there is pending a proceeding to foreclose such mortgage; and that he is informed and verily believes, that the land is not worth the amount of the encumbrance thereon; and that all these facts were known to the appellee and Ward at the time they made the representations to the appellant concerning the value of the land above the mortgage indebtedness. To the bill of complaint the appellee Strawn filed an answer, denying all the allegations in the bill of fraud and misrepresentations averred against him; and denied the allegations charging him with acting in collusion with Ward to defraud the appellant; but admitted that a trade was made in which he received the $15000.00 note and mortgage on the Texas land securing the same, in exchange for the Calhoun county land, subject to an encumbrance thereon of $10800.00 which the appellant agreed to assume as part of the purchase price of the same; and that the terms and conditions of the trade were embodied in a written agreement, executed by him and the appellant. The suit at law for recovery on the notes and the bill of complaint filed by the appellant were finally consolidated by agreement of the parties to be heard and disposed of as one case.

The consolidated case was heard by the court, and the court entered judgment therein in favor of the appellee and against the appellant on the note in controversy for $17285.00 in the assumpsit case; and dismissed the bill of complaint for want of equity. This appeal is prosecuted from the judgment, and the order dis-

missing the bill.

The evidence in this case discloses a series of fraudulent trade transactions which were brought about and manipulated by one J. Walton Ward, a real estate broker, which apparently culminated in the trade involved in this controversy. A careful perusal of the testimony and of the proofs in the record, leads to the conclusion that the chief purpose and object of the trade and exchange of properties here involved was to procure the appellant's name as endorser in making an exchange of a worthless $15000.00 note and mortgage, to the appellee, Charles M. Strawn, so that the appellant would be legally liable as endorser on the note, and thereby enable the appellee Strawn to collect the amount due thereon from the appellant. It is apparent from the evidence, that the dominant factor, and chief instigator and manipulator of a number of shifty transactions which preceeded and were connected with the one in question, was J. Walton Ward; and it was Ward who originated the $15000.00 note and mortgage, which was executed by C. P. Hudson and Sarah J. Hudson his wife, on 17 acres of land in Cameron County, Texas, the value of which was about $1700.00; but subject to a prior encumbrance thereon of about $10000.00; and Ward had procured the parties, who were financially irresponsible, to make the note and mortgage, obviously for the purpose of using it for some fraudulent purpose in a trade. This $15000.00 note and mortgage, was afterwards fastened on the appellant, by the false representation of Ward to the appellant, that the Texas land upon which it was given, was worth at least $1000.00 per acre. And the appellant thereupon traded his equity in Minnesota land, which he owned and valued at $5000.00, for the $15000.00 note and mortgage; and it was agreed between the appellant and Ward, that Ward was to have all that could be realized from the note and mortgage above the $5000.00. In view of this situation, the next thing which Ward apparently undertook to do for the appellant, was to bring about some trade by which they could realize the amount of

money, which each of them had tied up in the $15000.00 note and mortgage; and so Ward proposed, that the note and mortgage be traded for the land owned by the appellee in Calhoun county, which he represented to the appellant to be rich land, and worth from $150.00 to $175.00 per acre, or about $20000.00. At the instance of Ward this trade was thereupon consummated. The nature, quality and value of the 143 acres of Calhoun county land which appellant received in exchange for the note and mortgage in question, clearly appears from the testimony of John H. Fleming, a former owner who had lived on the land for many years, and finally conveyed it to John Kessinger, the grantor of the appellee. His testimony is as follows: "I owned the Kessinger farm in Calhoun county; I owned it about thirty years. I lived there about five years; I was married in 1898. That fall I moved on there. I put the improvements on that farm when I bought it. *** I sold it nearly five years ago. That would be about 1919. You might call it a cash transaction, I guess. When I conveyed that farm I made the deed to Kessinger. I got $4500.00 for it. There were drainage taxes on that at that time. I had never paid none of the drainage taxes, and I sold it subject to the drainage taxes. I do not know how much they were. I never took any pains to find out. I think it was about $600.00. There were no other liens on the place, except the drainage taxes. I got $4500.00, subject to the drainage tax of $600.00. The first nine or ten years I owned it, I did not live on it. It was all in prairie grass when I bought it. As soon as I was married, in the last twenty two years, I would judge, not over three crops out of five on the average. I mean by that, that I would not get more than three crops every five years on account of the overflow. I dont think it would average a bit better than that and hardly that good. ***** I put the improvements on there twenty two years ago last fall. I built a little house - a one story house, twenty four by fourteen, I think, the front part of it, and the L fourteen by eighteen, as near as I can recollect. ***** And I built a little

barn - small barn. I do not know just exactly what size it was. Just a good small frame barn - cheap barn - twelve feet high, I believe. I could not tell you exactly the cost of the improvements, but I know at that time, twenty two years ago, building material was very cheap and I was a kind of a carpenter myself, and I done most of the work, and the house cost about $180.00. The barn didnt cost very much either. I do not know how much - less than $100.00, I am satisfied. I built it too. At the time I sold this property to Kessinger I dont think there were any other improvements on the place. You see, Kessinger never got his deed for quite a while after I sold it. ***** I know that about two years out of five -possibly three - you never got any crop to amount to anything. The back water would back over there. There might have been two or three years during that time that there was no back water. That average would hold good for the last twenty five years - that is, as long as I lived there. ***** With reference to the sloughs or ponds on this farm, there was one large pond up in the field there - there was when I had it - I guess three acres in it - possibly four - we never got anything out of that. That is on the north part of the farm in that sixty. Then the other eighty has got what is called cockle burr slough winds through it from one side to the other. I have seen that slough dry, but as a rule there is a little water in it. I could not estimate acreage. I guess thirty feet wide. It goes plum across the eighty - in fourteen - I think it is, it winds around crooked - if it went straight across, it would not be so bad. Down toward the southwest corner, there is a patch of timber in there with a draw across there - I guess that there had been an old creek. I would judge that the timber land not susceptible to cultivation. ***** The old Sny cuts off about three acres off of the south end of the eighty. Sometimes it is possible that the Sny overflows, if it backs up from the river and then a big flood comes down the creek. It runs over a few feet higher than it would be just from the back

water. The depth of the overflow is dependent upon whether or not there is a volume of water coming down there at the same time that the back water is there. It makes a big difference. These other overflows were nothing to compare with the time when I had to have my hogs on a platform four feet high. ***** At the time I sold this land I consider I got a good price for it." After its sale to Kessinger, and at the time of the trade in question, the land referred to had apparently reached the dignity in value of carrying the encumbrance of $10800.00, subject to which it was traded to appellant- But who put on the encumbrance, or who holds it, the record does not disclose. Concerning the value of the land at the time of the trade in question, the great weight of the evidence, and the testimony of witnesses familiar with the land, its physical conditions and the handicaps for farming purposes justify the conclusion, that the fair cash market value of the land was about $50.00 per acre. It is true, that some witnesses for the appellee, placed the value of the land at $125.00 per acre; but it is apparent, that in estimating the value of the farm, they did not take into consideration or give proper consideration to the element of the overflow, and its effect on farming operations on the land. The false representations concerning the quality and value of this land were all made by Ward; and were undoubtedly made to induce the appellant to make the trade; and had that effect on the appellant, who had implicit confidence in Ward. The trade was one which the evidence shows, would result in great pecuniary benefit to the appellee; that is, if the appellant could be held legally liable as endorser on the note. Strawn would then realize $15000.00 for his equity in the Calhoun county land, which had practically no value over the $10800.00 mortgage encumbrance thereon; and this encumbrance the appellant in the trade assumed and agreed to pay. The appellee denies, that Ward acted in his behalf in making the trade; and denies, that he was working in collusion with Ward, in bringing about the trade, yet the chief object of the trade undoubtedly was to obtain the signature of the

appellant as an endorser on the $15000.00 note, in order to hold him as such; and the circumstances surrounding the transactions and connected therewith however, all point to the fact, that the appellee and Ward acted in concert, and had an understanding to bring about this result. The appellee was on intimate terms with Ward, who was his cousin by marriage; they had had a number of business deals together; evidently knew each other well; and each others methods in making trades and deals. Strawn was evidently aware of the fact, that the note and mortgage in question were worthless; and his information on the subject could only have come from Ward. When the trade was proposed to him by Ward and the appellant, at his garage he accepted the same without making any inquiry about the value of the mortgage security; and there was one matter only about which he seemed to be concerned, and that was the pecuniary responsibility of the appellant as endorser of the note; and this was the matter he investigated before he took the note and mortgage. It is apparent that, what the appellee wanted to accomplish by the trade, was to get appellant as endorser on the note; and this was the same purpose which actuated Ward, in inducing the appellant to make the trade. This feature of the case is further emphasized by the testimony of William Kastrup, with whom Ward also had trading deals. Kastrup testifies, that Ward took him over to Strawn's garage, after the trade in question had been accomplished, evidently with a view to convince Kastrup of his ability to make money for his clients; and when he got there, he called out to the appellee, and among other things said to him: "Charlie, I just sold that Tom Cockin farm to Kastrup - didnt I make you $15000.00 that quick?" (Snapping his fingers) Whereupon the appellee responded by saying "Yes you did, Bill."

We are of opinion, that the evidence sufficiently establishes the fact, that the appellee acted in collusion with Ward in the fraud which the evidence shows, was practiced upon the appellant to procure his signature as endorser upon the $15000.00 note, in making

the trade in controversy, and to get him to execute the contract under which the transfer of the note and mortgage was made; and that the contract and the endorsement on the note, and the deed made in connection therewith, should therefore be cancelled and set aside. But the record discloses another substantial reason why the appellant is entitled to the relief prayed for in his bill of complaint. The contract in question by its terms, requires, that the appellee furnish the appellant, and abstract showing a good merchantable title in the appellee to the Calhoun county land, which the appellant was to take subject to the $10800.00 encumbrance referred to. The abstract furnished, does not show such a title; but shows several matters in the chain of title which detrimentally affect its merchantability; the only one necessary to point out, is a mortgage encumbrance of $8800.00 which appears to have been placed upon the land by appellee's grantor October 1, 1919. This mortgage was made to the Farmers State Bank of Pittsfield. No release of the mortgage is shown by the abstract; and apparently it is still a lien upon the land. We conclude therefore that this trade should be rescinded; and that the contract made to effectuate it and the endorsement and transfer of the $15000.00 note, and the deed conveyance of the Calhoun county land, which is still held in escrow, should be cancelled and set aside; also, that the judgment rendered against appellant is erroneous. And in this view of the controversy, it is unnecessary to consider, or pass upon, the other questions raised in the case relating to the premature commencement of the assumpsit suit.

For the reasons stated, judgment is reversed; and the decree dismissing the bill for want of equity is reversed; and the cause is remanded with directions to enter a decree canceling the contract; and canceling appellant's endorsement on the note, and the assignment of the mortgage; also the deed of conveyance of the Calhoun county land, in accordance with the prayer of the bill of complaint.

Reversed and remanded with directions.

Gen.No.7851 April Term,1925. Agenda 26.

240 I.A. 680

Harold C.Wilber, Appellant vs. Estate of Lewis Wilber, Appellee	Appeal from the Circuit Court of Vermilion County.

Crow, J.

Lewis Wilber was appointed guardian for Harold C. Wilber, his son, October 14,1904. Harold was then eleven years old, and the only child by first marriage. Lewis was the executor of the estate of James B Courtney, grandfather of Harold In October 1906 he filed his final report as executor, therein charging himself with $389 as guardian as part of the distributive share of Harold. Later he charged himself with $16.10 as guardian as an additional distributive share of said estate In February 1908 he filed his inventory in the County Court charging himself with the total sum of $405.10.

The guardian died in November,1922 and a few days later an administrator of his estate was appointed. In May 1923, Harold Wilber filed a claim in the Probate Court against the estate. The items of the claim are: November 17,1906- Amount received by the deceased Lewis Wilber as guardian of Harold C.Wilber from the estate of James B. Courtney,deceased, $405.10. Interest on the amount for 16 years at 6 per cent per annum,$388.89. June 30,1913,Received by deceased Lewis Wilber, from Patomac Building and Loan Association, funds of Harold C. Wilber,$600. Interest on above amount for 9-1/2 years at 6 per cent per annum, $342. Total amount of claim, $1,735.99.

The cause was heard in the Probate Court where a judgment was rendered in favor of the claimant for the full amount of the claim. From that judgment an appeal was taken to the Circuit Court, and on trial by jury a verdict was returned for the administrator, upon which judgment was rendered To reverse that judgment the record is brought to this Court

by appeal.

Without going into a minute discussion of the evidence, it shows that the corpus of the funds in the hands of the guardian for his ward, the appellant, was the sum of $405.10 received from the appellant's grandfather. There is no evidence in the rather voluminous record that the guardian received any other amount for the ward from any source, unless certain money invested in building and loan stock was so received. But the evidence shows that whatever money was received from such stock was put into the association from which it was derived by the guardian. The conclusion is irresistable that all the money except that sum was the money of the guardian. No other source is suggested. The total claim of appellant against the estate was $1,735.99. As itemized in the claim presented, the claim consists of four items: $405.10 received November 17, 1906 and interest on that sum for 16 years at six per cent per annum; $388.89; June 30,1913, amount received by Lewis Wilber deceased guardian-from Potomac Building and Loan Association, funds of Harold C.Wilber, $600; interest on "above amount" for nine and one half years at six per cent per annum, $342, total amount of claim being $1,735.99. The affidavit of claimant is that the claim against the estate of his father as itemized "is just and unpaid after allowing all just credits".

The statment of the justness of the claim is, of course, a mere conclusion of the claimant as is also the statement it is unpaid. The evidence of the trial fills about one hundred and twenty pages of the transcript of the record and about the same number of pages of the printed abstract. We do not consider it important to set out in detail the evidence leading to the conclusion we reach for it would extend this opinion to an unnecessary length and serve no useful purpose.

Examining the record erbracing this controversy, we are again impressed with the conviction that courts are not, and ought not be, machines governed exclusively by fixed rules.

without discretion in their application. There is no basis for doubt as to the claimant having received from his father and guardian money and the benefit of the expenditure of money for in excess of the pittance received by him as guardian, and in excess of the interest claimed. Claimant was entitled to only $405.10 from his grandfather's estate. Lewis Wilber could make no final settlement of the Courtney estate until some one was appointed guardian to whom should be paid the amount due Harold. To close it up, no doubt, judged by common knowledge of such affairs, he was appointed guardian October 14,1904, and in his report charged himself as such with two items aggregating $405.10 and crediting his account as executor with like amount. The executorship was thereby closed and from that he was relieved of further responsibility. His report of distribution as executor was made November 17,1905. His inventory as guardian was filed February 25,1905.

In view of the contention of appellant with regard to the building and loan stock, it is material to ascertain its origin. As in all such stock it was part of a series. J.B. Payne, who was secretary of the association when the stock was issued, testified it was issued between April 1 and October 1, 1904. The certificate was dated April 1, and the next series began October 1. But of course the date of issue would influence the maturity of it. Whether that be true or not it shows that claimant's father was diligent in the protection of his rights. Before the settlement of the estate from which appellant claims, stock had been bought by the guardian and was afterward paid by him to maturity. The petition for the appointment of Lewis Wilber as guardian for Harold was filed about October 10, 1904. It was stated therein that the personal estate of the ward was "of the value of about $500". Claimant charged interest on all the sums alleged to have been in the hands of his father but gave no credit for the large amount of money generously paid by him for his son's benefit.

For appellant it is contended that if the father made a gift to the son he could not afterward change it and charge the son, his ward, with the amount as payments. This reference is probably to the first investment in building and loan stock. The first certificate for $600 in the building and loan association was taken out by Lewis Wilber between April 1 and October 1,1904. The certificate was taken at a time when Mr. Wilber knew he would have something to invest for his son, and about which time he was appointed guardian. He made all payments on the stock. There can be no valid claim that the guardian concealed anything. Equitably there is as much reason for saying the investment was made in anticipation of the receipt of his ward's funds, they being actually in his hands, as for saying it was an unchangeable gift. Indeed, the conclusion is fully warranted by the large amount of money spent for the claimant in other shares of stock and for necessary purposes before and after he reached his majority. Whether as father or as guardian, accounts were kept and he was not niggardly with his only son. Yet for none of these does he make allowance by way of credit while charging full amounts for interest. Not only did the father give him checks in generous sums, but, no doubt by consent, he drew checks as shown by the evidence, against his father's account, following the name signed to the checks with his initials. Most of the money to pay for a thousand dollar share of building and loan stock was paid by the father and the share in the ward's name was assigned to his wife. He and one dependent on him received money thereby, which in equity and conscience he has no right to demand shall be paid again to him. The record is replete with evidence corroborating the testimony of the widow that he had received all that belonged to him, as he stated to her.

The evidence shows large sums were paid to him after he arrived at majority. Notes were paid for him, while in business, for which presumably he received a benefit. At all events, he would be bound to account for the sums so paid for him. Probate Courts and the Circuit Court sitting on appeal from

their orders in such matters are guided by equitable principles as shown by all the authorities and it is needless to cite them. A careful consideration of the evidence in this case satisfies us the verdict of the jury and judgment of the Circuit Court were right. It may be some errors were committed in ruling at the trial. But they were not of a character to warrant a reversal of the judgment, it being clearly right. For this reason the alleged errors are not more particularly noticed. The judgment of the Circuit Court is affirmed.

Affirmed.

GEN. NO.7855 APRIL TERM, A.D.1925. AGENDA NO.56

D. T. Black, Appellee
vs.
Lincoln Mutual Casualty Company of Springfield.

Appeal from the County Court of Clark County.

240 I.A. 680

Crow, J.

The action was by appellee for loss of a Ford sedan car by theft, alleged to have been insured by appellant insurance company. There was a verdict and judgment for appellee and appellant brings the record to this Court for review.

There is no controversy as to the facts. Appellant states them elaborately and appellee admits in the brief filed that they are correctly stated and for that reason makes no statement of facts.

Substantially, the conceded facts are that Lincoln Mutual Casualty Company, incorporated, issued its policy of insurance against loss by fire and theft upon a Dodge automobile belonging to Black, residing at Marshall, in the sum of $1000, March 19, 1920, for a period of three years. The application was procured and sent to the Company by George Adams, a local agent residing at Marshall. Black sold the Dodge car in June following, and had the insurance transferred to a Ford sedan purchased by him. This transfer was effected through Adams, upon a new application, the policy being dated June 19,1920, for the same amount and on the same terms as in the former policy. Afterward, about the middle of July,1922, Black sold his Ford sedan and bought a new one. He gave the policy to Adams to have the insurance transferred to the new car. Adams promised to have the change made, but failed to do so. He claimed he had sent it to Roland Lintherman, a former district agent for appellant in Illinois and embracing the territory in which the

automobile was situated. Adams had formerly transacted his business through Lintherman, but at the time the policy was last delivered to Adams neither he nor Lintherman were connected with the company, the license of Adams having been canceled in August 1921. Lintherman returned the policy on the first Ford sedan to Adams, who had gone to Gary, Indiana. The next day Black notified Adams the new car, the second Ford sedan, had been stolen. The first Ford car bore engine number 3,962,459; the second, engine number 6,237,036. The policy number on the first was 25,364, and was never changed.

After the theft, notice having been sent to appellant company of the loss, it denied liability. Black did not look at his policy when he received it after it had been sent to Adams to be changed. If he had, he would have known he had no policy on his last car. The declaration consisted of a special count and the common counts. The special count, averring the insurance of the first Ford car, giving its number and its policy number as above, and the theft of the second car, averred that after the purchase of the new car the policy on the first was delivered to Adams "former agent of defendant" to have the insurance changed and transferred to cover a new Ford sedan with engine number 6,237,063 which plaintiff had purchased, and desired to have covered by insurance for the sum of $1000 against loss by fire and theft and that said Adams took the policy on or about the 20th day of July, 1922 and promised plaintiff to have the same transferred to the new Ford sedan but that he refused and neglected to do so "and that it was stolen on September 4, 1922; and he being then under the belief the defendant was insuring the said car against fire and theft, and that said automobile has never been restored to the plaintiff by defendant, and that they had not paid, and refused to pay him for the value thereof to his damage in the sum of $1000 etc".

To the declaration defendant pleaded the general

issue, the statute of frauds and denying the agency of George Adams and of Roland Lintherman at the time the policy was delivered to them for change; and denying notice to defendant of the change of cars or supposed transfer of insurance from the first to the latter Ford car. The foregoing statement is taken substantially from the brief for appellant for the reason it is conceded by counsel for appellee to be correct.

The entire record has been carefully examined. Seventeen errors have been assigned on the record and, while we are of the opinion nearly all are well assigned, we are further of the opinion only one question need be considered in the disposition of the case. We allow counsel for appellee to state that question as he does in the first sentence of his brief: "The question involved in this case is the right of an assured to recover damages for the loss by theft of an automobile which the assured thought was insured at the time the car was stolen". While it is not strictly accurate, it is sufficiently so. The inaccuracy consists in the assumption plaintiff was "an assured". The evidence fails to show he was insured. It shows conclusively that, as a reasonably prudent man he could not have supposed, or thought, he was insured. Pleas filed, among others, denied the agency and thereupon it was incumbent on plaintiff to prove it by competent evidence. This was not done. A mass of incompetent evidence was allowed to go to the jury on this point over the objection of defendant. All the evidence in the record shows neither Adams nor Lintherman was an agent of defendant at the time of the purchase of the last Ford car. Neither did they pretend to insure the car as agent of defendant company.

There is no theory presented by the record upon which plaintiff can recover from defendant. The error assigned by appellant challenging the refusal of the Court to direct a verdict is well assigned. It admits every fact proved and every integral fact the evidence tends to prove. The Court

should have directed a verdict for defendant and for the error in not so doing the judgment is reversed without remandment.

Reversed.

Rehearing denied Feb 23 - 1926

General No. 7893 | OCTOBER TERM, A.D. 1925. | Agenda No. 3.

The People of the State of Illinois, Defendants in Error

vs.

Tony Brush, Plaintiff in Error

Error to the County Court of Christian County.

50/446

240 I.A. 680

Crow, J.

Plaintiff in error having been convicted of violation of the Prohibition Act of the State of Illinois, brings the record here asking a reversal of the judgment of conviction. We have read the abstract of the record and the briefs and arguments of the respective counsel.

Two points only are made in the brief for plaintiff in error- 1. That the information upon which Brush was tried was too indefinite and uncertain to support a judgment that he might afterward wish to plead as a bar to subsequent prosecution for the same offense. We think the information sufficiently certain to support the judgment rendered.

2. The second contention is that the witnesses testified to the intoxicating quality of the stuff sold and that it did not appear they had any knowledge of the matter about which they testified. It does not require an expert to determine whether a given liquid or liquor is intoxicating. If one knows what intoxication is, and having tested the liquor under investigation and knows and testifies it intoxicates him, he is competent and if the jury believes him it is sufficient to warrant a conviction if the belief thereby generated was beyond a reasonable doubt, with such proof as to all the other elements of the crime. We cannot say the evidence was insufficient to establish the offense beyond a reasonable doubt.

These being the only points made in the brief, we will not under rule 23 of this Court consider any other question. The judgment of the County Court of Christian County is affirmed.

Affirmed.

Passing on petition for rehearing, we call attention to Rule 23 of this Court.

Rule 23 of the Rules of Practice of this Court, inter alia, provides: "Each party shall file a printed brief in the cause, x x x Following the statment of the case the brief shall conclude with the points made and the authorities relied upon in support of them; x x x No alleged error or point not contained in such brief shall be raised afterwards, either by reply brief, or in oral or printed argument or on petition for rehearing. x x x The brief of any party may be followed by an argument in support of such brief, which shall be distinct therefrom, but may be bound with the same. The argument shall be confined to discussion and elaboration of the points contained in the brief."

On petition for rehearing, for the first time misjoinder of counts in the information upon which plaintiff in error was convicted, is urged. That point was not presented in the brief upon which the cause was taken and decided. If it had been it would have received the consideration to which it was entitled. The point now presented is not for a rehearing but is a petition for a hearing and decision upon a point presented for the first time. The application is in violation of the rule and will not be considered. As to the second point, upon the evidence, we find no occasion to recede from what was said in the original opinion.

The petition for rehearing is denied.

GEN. NO.7903. OCTOBER TERM, A.D.1925. AGENDA NO.11.

The People of the State of Illinois, Defendant in Error	)	Error to the County
vs.	)	Court of Christian
Frances Brouay, Plaintiff in Error	)	County.

240 I.A. 681

Crow, J.

Plaintiff in error was prosecuted by information in the County Court of Christian County for violation of the State Prohibition Law. The information charged in one count

> "that Frances Brouay late of said County, on the Twenty-fifth day of November in the year of Our Lord one thousand nine hundred and Twenty-three, at and within said County of Christian, in the State of Illinois, aforesaid, did unlawfully have and possess intoxicating liquor intended for use by sale, for beverage purposes, in violation of the Illinois Prohibition Act, she the said Frances Brouay not having any permit from the Attorney General of the State of Illinois to possess said intoxicating liquor aforesaid, or permit from the government of the United States of America, or the said intoxicating liquor aforesaid not being lawfully acquired and was not for use only for the personal consumption of the said Frances Brouay and her family residing in her private dwelling, while the same was occupied and used by her as her dwelling only, said possession of said intoxicating liquor aforesaid by the said Frances Brouay not being authorized under the Illinois Prohibition Act to so possess said intoxicating liquor, said liquor not being possessed for medical or sacramental purposes and not prescribed by a physician, and without any authority of whatsoever, to possess said intoxicating liquor was then and there prohibited and unlawfully ***"

A motion to quash the information was filed and overruled. No error in that regard is urged here. On trial by jury plaintiff in error was found guilty, Motions for new trial and in arrest of judgment being overruled, she was adjudged to pay a fine of four hundred dollars and costs and to stand committed to the County jail until the fine and costs were paid, and in addition thereto, she was sentenced to confinement in the County jail for a term of ninety days. She brings the record to this Court by writ of error, assigning as grounds for reversal eleven errors. We consider it necessary to notice only two.

The first ground for reversal is that she was not in possession of the liquor charged to have been in her possession. She resided with her parents. She had two small children. There is not a scintilla of evidence in the record that the liquor was in her possession any more than it was in the possession of her mother who was sick, or of her father who was in the yard at the time the liquor was found. She testified, and in that she is corroborated by her mother, that the liquor was alcohol given to her mother by a daughter who was a nurse in Chicago. The husband of one of her daughters is a physician. That it was used to rub her mother's limbs when she was suffering from pain. She had used it when in the hospital. It was kept upstairs because the mother was afraid the little children might get hold of it. The "up-stairs" room had no floor but had some boards laid on the joists, or as the witnesses said, on the rafters. The place was reached by stairs. On the day the liquor was found a deputy sheriff and some police officers of Pana went to the house and entered it. They testified they were making a raid and after they got into the house they heard glass break and some of them went upstairs. They found some liquor on the boards and one of them with a handkerchief mopped up and squeezed into a bottle a half pint of the liquor. One of the officers testified defendant was "hiding behind the chimney" which extended through the attic. Others testified she was standing by the chimney, one saying she was not concealed.

It was agreed at the trial that the contents of the bottle said to contain the liquor, and which was present at the trial, was shown by analysis to contain forty-seven per cent of alcohol by volume. It was dark in color. Part of it was "mopped up" as stated above and part ran through between the planks in the attic floor and was caught in a pan by one of the raiders. Defendant testified it was clear and that the dirt on the floor gave it the dark color. The officers testified it was mule.

No one testified that the liquid found and which some of the witnesses testified before the jury was mule, was fit for beverage purposes. The only evidence in the record with regard to the use of it shows it was used by external application for medicinal purposes. No evidence is in the record showing she had it in her possession for sale for beverage purposes or that it was fit for beverage purposes. This law, like every other, must be enforced. But no one can be, or ought to be, adjudged guilty upon suspicion howsoever grave or strong it may be. In the face of the positive uncontradicted evidence that it was used for medicinal purposes, a jury cannot conjecture, and no court can legally find, a guilt, possession, unless there is evidence sufficient to show the fact beyond a reasonable doubt.

Upon this condition of the record, the Court gave to the jury the following instruction at the request of the prosecution:

> "The court instructs the jury that the statute of the State of Illinois provides that the possession of intoxicating liquor by any person not legally permitted to possess intoxicating liquor, shall be prima facie evidence that such liquor is kept for the purpose of being bartered, furnished, or otherwise disposed of in violation of law; it shall not be unlawful to possess intoxicating liquor in one's private dwelling while the same is occupied and used by him as his dwelling only, provided such intoxicating liquor was lawfully acquired and is for the use only of the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein, but the burden of proof shall be upon possessor of any intoxicating liquor, in any action concerning the same, to prove that such liquor was lawfully acquired, possessed and used".

The vice of the instruction is emphasized by the fact that the only evidence as to the use of the liquor shows it was not unlawful. The evil to be suppressed by the legislation, National and State, is drunkeness and the evils it entails. If alcohol in its different forms had been used only for medicinal purposes the debate among the medical profession might have reached only the stage of more or less animated discussion as to its utility as a therapeutic agent, But this instruction

begins with an assumption that the liquor found, whatever it was, to whatever use it was to be devoted and from whatever source it was derived, was in the possession of one "not legally permitted to possess it", and then told the jury that the possession was "evidence that such liquor is kept for the purpose of being bartered, furnished or otherwise disposed of in violation of law". The word prime facie means nothing to a jury generally. Some jurors understand it but juries generally, it is believed, know nothing of its real value as a term measuring the probative value of evidence. The statutory rule of evidence is applicable only for the purpose of fixing the burden of proof as to intention or purpose of possession. Fault cannot be found with it. If one has undoubted possession of intoxicating liquor within the statutory definition, it is no hardship on him to be required to account for the possession. But before the statutory evidence rule is applicable, it must be shown by the prosecution that the defendant possessed intoxicating liquor as defined. It cannot be applied until the prosecution has shown a case by evidence, if uncontradicted, sufficient to make it appear the liquor was alcohol, or other liquor mentioned, containing one half of one per centum or more of alcohol by volume, and them show such liquor is fit for use for beverage purposes. Until such proof is made, there is nothing prima facie to apply against the person charged. After it is made, and defendant accounts for the possession, it no longer applies. People v. Tate, 316 Ill. 59, applies the principle. It is not now. Johnson v.Pendergast, 308 Ill. 255; People v. Brinnegar, 7625,October Term 1923 of this Court. As a further ground for reversal, the penalty imposed is beyond that authorized by the Statute. For this offense fine and imprisonment cannot be imposed. Both were imposed.

For the reasons assigned the judgment of the County Court is reversed and the case remanded.

Reversed and Remanded.

Gen. No. 7915. October Term, A. D. 1925. Agenda 23.

Town of Prairieton, Appellee, vs. Frank Wooters, Appellant,	)	Appeal from the Circuit Court of Christian County.

240 I.A. 681

Crow, J.

A complaint was filed before a Justice of the Peace charging appellant with having constructed a public highway in violation of the statute. The Justice found him guilty and assessed a fine against him and he appealed to the Circuit Court. The cause was heard by the Court, a jury being waived. He was again found guilty and a fine of three dollars and costs was assessed against him. He brings the record to this Court by appeal, alleging as errors that the Court admitted improper evidence; refused to admit proper evidence; refused to hold certain propositions of law and modifying others asked by appellant; in finding appellant guilty and rendering judgment against him for the fine and costs.

It is not the matter of the fine that brings the cause here, his counsel says, but the important question is, whether there was, infact, a public highway. It is contended there was no legal proceeding laying out the highway. That being true the only question remaining is, was there a way by prescription?

In January, 1900, a petition was presented to the Commissioners of Highways of the Town Prairieton praying for the laying out of a road twenty feet wide on the township line, ten feet of which road was to be on each side of the line. The property was owned by six persons. The petition was signed by sixteen petitioners. On the tenth of February, 1900, a meeting of the commissioners of Highways was held and they decided to grant the prayer of the petition. On the same day the owners of the land on which the road was sought to be paid out, except one, signed a release of all claims for damages sustained by

reason of the laying out and opening of the road through the lands. So far as the record discloses no further proceedings were had with regard to laying out the road. None was therefore established by the highway authorities.

We have not read the transcript of the record to ascertain the evidence in unabriged form. We have read the abstract filed by appellant and the additional abstract filed by appellee. It is clear from reading both abstracts that for more than twenty years a traveled way has existed running east and west and turning north. It was used to get to timber land, a slaughter house and a mill and was used by different persons to get to homes along and near to the line of the road. It is equally clear that during all of that time gates of plank or wire have been placed across the roadway and more or less constantly maintained. Part of the time they remained across it for some time and would then be taken down and uninterrupted travel permitted for a while. There has not been a continuous traveled way on a fixed line. The traveled way moved from one side to another. Part of the time a wash or ditch was in the road and people traveling there went on one side or the other. During all that time there has been no claim of right in the supposed way by anyone adversely, continuously and uninterruptedly. Any claim of a right of way has been in subordination to the rights and claims of some one along the route claimed as a highway. Such right to travel was always permission. Those who used it were notified that if they did not keep the gate across it closed it would be locked. It was locked.

We are according the trial court all the advantage of seeing and hearing the witnesses and observing their demeanor while testifying. But, having done so, we are unable to avoid the conclusion arrived at from the abstracts of the record, and applying the elementary rules of law to the facts, that there was no established road as charged in the complaint. The defendant should have been discharged.

The judgment of the Circuit Court of Christian County is reversed.

Reversed.

Gen. No.7918 October Term,1925 Agenda 26

The First National Bank of Monticello,

Appellant,

v.

John W.Dubson,

Appellee.

240 I.A. 681

Appeal from the Circuit Court of Piatt County.

Crow,J.

Appellant recovered a judgment by confession against appellee in vacation, September 26, 1923, for the sum of $770.95 including $70 as attorney's fee for plaintiff's attorney. The note was in the usual form of judgment note, with power of attorney authorizing any attorney of any court of record to appear for the maker in such court in term time or vacation at any time after the execution of the note, and confess judgment, without process in favor of the holder of it for such amount as may appear unpaid thereon, with costs, and to waive and release errors intervening in such proceedings, and to consent to immediate execution upon the judgment. It was payable to Ross Churchhill and endorsed by him and delivered to appellant. An affidavit was filed with the declaration and cognovit, stating that affiant was acquainted with the handwriting of Dubson and that the signature to the note and power of attorney was the genuine signature of the said Dubson and that there was due thereon the sum of $700.95, including principal and interest and not including $70, a reasonable attorney's fee; that Dubson was then alive. At the October term of the Court next following certain proceedings were had and orders entered from which an appeal was prosecuted to this Court and the appeal dismissed for the reason no final judgment had been entered. That was the only question then before us requiring disposition. On remandment, the record as now presented was completed, and the plaintiff appeals assigning four errors which will be noticed so far as necessary to a decision of the case.

At the October term of the Court following the entry of the judgment, as shown by the abstract, leave was granted to defendant to plead to the merits and execution was stayed. Leave was granted to plaintiff to file an amended declaration but none was filed. October 24,1923, leave was asked to file the original note nunc pro tunc. January 3, 1924, being a day of the October term, 1923, defendant's motion to vacate the judgment was allowed, and thereupon defendant withdrew his motion for leave to plead and for order staying execution. At the same time the motion previously made by plaintiff for leave to file the note nunc pro tunc, as of September 23, 1923, was allowed. For some reason not explained and to us inconceivable, plaintiff offered in evidence a real estate mortgage given by Dubson and wife to T. W.Doss. The transcript recites that to this offer defendant excepted. The motion of defendant Dubson to quash the execution issued on the judgment was overruled, and stay of execution was allowed pending appeal to this Court. Plaintiff at the same time presented a motion to vacate the order vacating the judgment and quashing the execution which the Court overruled. The Court then entered an order taxing all costs against the plaintiff. A further order was entered that the judgment entered September 26, 1923, in favor of plaintiff and against defendant by confession be vacated and execution quashed.

The foregoing proceedings, as shown by the abstract, occurred before the appeal to this Court referred to. That appeal was dismissed because there had been no final judgment settling the right of plaintiff (appellant) to recover from the defendant (appellee). So far as the proceedings in the lower court were concerned, they were suspended until the mandate from this court authorized and directed them to go on.

At the June term,1924, of the Circuit Court, the mandate having been filed, the plaintiff presented its motion for an order setting aside the stay of execution theretofore entered which was denied. Motion was then presented for

a rule on the defendant to file pleas to the declaration. This motion seems to have stood over until May 5, of the February term, 1925. On that day it was overruled and order entered vacating the judgment with a judgment against Plaintiff for costs. To review the proceedings of the Circuit Court this appeal is prosecuted. All proceedings in this case from its inception are open to review, the former appeal having concluded nothing.

The motion in the Circuit Court sought to have the judgment set aside, vacated and annulled and to quash the execution issued thereon. The grounds for that motion were: (1) The original note was not filed with the declaration and cognovit; (2) the copy of the note attached to the declaration disclosed it was payable to the order of Ross W.Churchill but does not show it was endorsed by him" and on the face of the record of said judgment the creditor is not the owner and holder of said note"; (3) $70 attorney's fee was unlawfully included in the judgment; (4) the damage laid in the declaration was $700.95 and the judgment being in excess of that amount "became void and is of no force and effect"; (5) the affidavit attached to the cognovit did not show by what authority or legal right he made the same.

The power of attorney to confess judgment was not a separate instrument but a part of the note. It immediately follows the note proper containing the promise to pay, and was signed in one place only, at the end of the power. The fact that it authorized a confession of judgment did not affect its negotiability. Negotiable Instrument Law, Section 5, Smith-Hurd's Statutes. The judgment debtor is in no better position, therefore, to interpose the defenses he attempts to make than if the note were payable directly to the bank which obtained the judgment sought to be vacated. On a motion to vacate a judgment confessed by authority and for leave to plead, the question is not whether the judgment should be set aside for errors of law, but whether there exists any equitable reason for opening

the judgment to let in a defense. Moyses v. Schendorf, et al. 238 Ill. 232;(citing Knox v. Winstead Savings Bank, 57 Ill. 331; Mumford v. Tolman, 157 id. 258; Hall v. Jones,32 id 38; Pearce v. Miller, 201 id. 188; Rising v. Brainard, 36 id. 79; Cowden v. Besse 86 id. 159.) The principle controlling the exercise of equitable powers in the matter of judgments at law is, Courts of equity will not interfere to prevent the collection of a judgment, even though the judgment was rendered without service of process, unless a meritorious defense be shown. Reed v. New York Exchange Bank, 230 Ill. 50,(citing Colson v. Leitch,110 id. 504). Further illustrating the strict principle in the Reed case it is said:

> "It is not sufficient that a judgment is irregular, but it must be unjust, before equity will interfere. A showing on the bill for injunction that the judgment in question was obtained without process does not show, nor tend to show, that if process had been served and defense interposed, the result would have been different. In the case at bar, appellant alleges in his bill that the judgment complained of was obtained without service of process, and the Court, upon demurrer held, and we think properly, that this was not a sufficient showing of a valid defense to justify the intervention of equity. Everything in this bill might be true and still the judgment might have been by confession under a power of attorney contained in the note, waiving notice and service of process. In Chicago Fire Proofing Co. et al. v. Park National Bank, 145 Ill. 481, an application to vacate a judgment, it is said (Page 487):
> 'In an application of this character to vacate a judgment and for leave to plead, affidavits filed in support of the motion are to be construed most strongly against the party making the application. It is not sufficient to state facts from which, is proved on a trial, a defense might be inferred. Crossman v. Wohlleben, 90 Ill. 537. When the affidavits relied on in this case are tested by the rule indicated, it is apparent no case was made out by appellant.' "

Let this case be tested upon the facts by these authoritative principles. At the time the confessed judgment was entered an affidavit was attached to the narr, and cognovit upon which it was entered in substance following:

> "William Dighton being duly sworn deposes and says he is acquainted with J.W.Dubson, the defendant, and that he is acquainted with his handwriting and that the signature to said note and power of attorney is the genuine signature of the said J.W.Dubson and that there is now due plaintiff from defendant after allowing all offsets and counterclaims, the sum of $700.95,including principal, interest and not including $70 a reasonable attorney's fee. That the consideration therefor was for value, andthat the defendant, J.W.Dubson is living and that no part of said debt is for usurious interest.

This affidavit meets the requirements for a valid judgment as stated in Gardner v. Bunn et al., 132 Ill. 403. That case only held that a judgment by confession in vacation is void where no affidavit proving the execution of the power of attorney is filed when the judgment is rendered.

If it was material that the original note and power of attorney should be and remain attached to the declaration and cognovit, proof of the fact is in the record. The declaration and cognovit are dated and filed the same day as the judgment. Every presumption is indulged in favor of the proper discharge by an officer of his duty. But more pregnant is the proof of the fact by the conduct of defendant. He filed an affidavit in support of his motion to vacate the judgment. He does not deny the execution of the note and power. He does not say the original note was not attached to the declaration and cognovit. If he did not deliberately evade that issue, he did not meet it. It nowhere appears it was not filed. In his affidavit, in substance, he says he has examined the declaration upon which said judgments was rendered, and that "said note attached to said declaration is not the original note given by this affiant in said matter, but is only a copy of the same and so only purported to be". From this it does not appear and cannot be inferred, the original was not attached at the time the judgment was entered. The statute requires a copy of the note sued on in any action to be filed with it. So, support of that contention of appellee for vacating the judgment completely fails. It affords not a shadow of reason for vacating it. Appellee owes this debt nothing shows it to be unjust. If he can evade payment of it by the process displayed in the record before us, he must do so by the aid of a Court without any precedent therefor. If, as decided by the Supreme Court in the cases above quoted he could not be let in to defend even where no process was issued or served, a fortiori, may he not do so under the case made here. As we said when the case was previously here, it is anomalous to ask to be let in to

plead in avoidance of a void judgment. He is not seeking to attack collaterally a void judgment, in which event no power would exist to modify it. The only question before us at the previous term was whether there was a final appealable judgment and that was the only question decided.

> " Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process. Judgments entered in vacation shall have like force and effect, and from the date thereof become liens in like manner and extent as judgments entered in term. Chapter 110, Section 88, Smith-Hurd's Statutes.
>
> "Judgment shall not be arrested or stayed after verdict, nor shall any judgment *****upon confession, nil dicit or non sum informatus *****be reversed, impaired or in any way affected, by reason of any of the following imperfections, omissions, defects, matters or things in the process, pleadings, proceedings or records, namely: *****Fourth, For any variance between the original writ or process and the declaration, bill, plaint, or demand. *******Tenth, For any mistake ***** in any sum of money." Chap. 7, Sec.5, Smith-Hurd's Statutes.

The judgment below being in excess of the ad damnum laid in the declaration it is contended by appellee it is void. Appellant contends that he should have leave to file nunc pro tunc an amended declaration to conform to the judgment. We think that might be proper if the fact were as appellant seems to contend, that he may have attorney's fees. But upon consideration of the power of attorney, we are of the opinion it did not authorize the attorney to confess judgment for any sum of money as attorney's fee for collection of the note. If it did, the clerk in vacation had no authority to enter a judgment therefor. The power certainly did not authorize a sum certain as attorney' fee to be entered, and it must, therefore, have rested in computation or ascertainment. The clerk possessed no such judicial powers. Campbell et al. v. Goddard, 117 Ill. 251. But aside from the fact the power is a blank on the subject of fees, it did not confer authority on any attorney to confess judgment therefor. It was authority authorizing the confession and judgment contemplated by the foregoing section. It was a standard

form, probably generally completed by filling the blank for the number of dollars as attorney's fee. We are of the opinion, and so hold, that no attorney's fee can properly be included in the judgment. In all other respects it is unassailable in this proceeding. Under the equitable powers of a court of law in such matters, as indicated by the Supreme Court in the Campbell case, supra, it has power to modify the judgment to conform to the warrant or power of attorney.

The disposition of the case calling for no further examination of the record, the judgment of the Circuit Court of Piatt County vacating the judgment below and rendering judgment for costs is reversed and the cause remanded to that Court with directions to modify with respect to the amount the said judgment entered in vacation so as to show a judgment rendered in favor of First National Bank of Monticello as of the 20th day of September, A.D.1923 for the sum of Seven Hundred Dollars and Ninety-Five Cents ($790.95), against John W. Dubson. That Court is further directed to dismiss the proceedings instituted by John W.Dubson and to render judgment against him for all costs except those occasioned by and taxed at the October term, 1923 of the Circuit Court, and to award execution therefor. Judgment will be entered in this Court against appellee for all costs occasioned by this appeal.

Reversed.

General No. 7943 October Term, 19[illegible] Agenda 44.

Rebecca Jones,
Appellee

v. Appeal from the Circuit Court of

Sarah Klupo, Sangamon County.

Appellant.

240 I.A. 681

Crow, J.

This case is here on appeal, as it is said by appellant's counsel, from a decree rendered by the Circuit Court of Sangamon County against her and in favor of appellee. Much fault is found with the decree. Being curious to know the facts found and the terms of the decree entered, of which complaint is made, we examined the abstract. We fail to find it there, even in substance. The case was referred to the Master who took the evidence, as counsel says, but the Master does not say so. There is incorporated in the abstract findings of the Master. Objections to the report are incorporated also. But if there were exceptions to the report before the Court which were necessary they do not appear. The abstract refers us to the page of the transcript where the decree may be found but courts of review never go to the transcript to reverse, but may to affirm a decree.

The rules of this Court require an abstract of the record to be filed. This is necessary in order to have a review of any case brought here by appeal or error. It must be sufficiently full to present every matter necessary to ascertain whether error was committed by the trial Court. If such error does not appear from the abstract the decree or judgment will always be affirmed. This is on the principle that he who alleges error must make it appear. Among the great number of cases stating this rule, we refer to Gibler v. City of Mattoon, 167 Ill. 18; Phillips v. Benfield, 239 id. 139. In the latter case the Court say: "As the errors assigned upon the record are not made to appear by the abstract of the record filed in this case, the decree of the County Court is affirmed."

Under the condition of the abstract no error appears, and the decree of the Circuit Court is affirmed.

Affirmed.

3012

Gen. No. 7904 OCTOBER TERM, 1925 Agenda No. 12.

Frank Orr and Margaret T. Yates, Executors, etc., Appellees, v. Catherine Rush et al. Appellants.	240 I.A. 681 Appeal from the Circuit Court of Pike County, Illinois.

Shurtleff, J.

This is an appeal from a decree of the Circuit Court of Pike County appointing a trustee and directing a trust fund in the estate of Ellen M. Orr, deceased. Ellen M. Orr died on January 28, 1924, leaving a last will and testament which has been probated and the executor and executrix, Frank Orr and Margaret T. Yates, named in the will have settled the estate. Under a part of the ninth clause of the will the testatrix provided as follows:

"To Cyrus Rush in trust one-sixth of the remainder of said part two and the net income thereof to be paid to his mother Catherine Rush, annually during her lifetime and at her death the principal and any remaining income not paid to her to be divided equally between Cyrus Rush, Anna R. Rush, Bertha M. Graham, children, and Eli Williams, grandson, of said Catherine Rush."

Catherine Rush, who takes a life interest in said fund, is a lady past ninety-two years of age, in very poor health, and was a sister of the testatrix in her lifetime. Cyrus Rush, named in said clause as trustee, died prior to the decease of Mrs. Orr. The fund in question amounts to $11,761.10, which has been invested by the executors in Liberty bonds of the United States, fourth issue, drawing interest at the rate of 4¼ per cent per annum, to which there will be added a further sum of fifteen

hundred dollars, making said trust fund upon complete distribution the sum of $13,261.10. The executors filed their bill praying the appointment of a trustee to take over said fund, the trustee named in the will having died, and suggesting the appointment of the First National Bank of Pittsfield, which has a department engaged in the execution of trusts under the State and Federal law, and suggesting the continued investment of said funds in the Liberty bonds, as now invested, as a better and safer security. It appears that the executors had transacted all of the business of the estate with the First National Bank of Pittsfield. Catherine Rush answered the bill admitting the substantial and material allegations in it and prayed for the appointment of a trustee friendly to her, and a suitable person. It appears that Catherine Rush was desirous of the appointment of Fred H. Farrand, cashier of the Illinois Valley Bank of Griggsville, named in the decree as trustee. The appellants filed answer, requesting the appointment of the First National Bank of Pittsfield as suggested by the executors. Proofs were taken and it appears that Catherine Rush is living in California with a daughter Helen Rush, whom the testatrix mentioned in her will and about whom she stated: For personal reasons, which she considered just and reasonable, it was her will that Helen Rush have or take no part in her estate.

It further appears from the testimony of Fred H. Farrand that Catherine Rush has a life estate in about four hundred acres of land, of which the said Helen Rush is the owner of the remainder in fee, to the amount of three hundred twenty acres; that these lands have been mortgaged to the Federal Joint Stock Land Bak of Edwardsville for the sum of twenty thousand dollars, and that the said Farrand, for the benefit of the Illinois Valley Bank, has taken title to these lands for the advancement of about ten thousand dollars to pay the debts, taxes, etc. upon said lands, and the most of it, as Mr. Farrand testifies, to pay the upkeep

of Catherine Rush and her daughter (Helen). The witness further states that Catherine Rush is an invalid, practically without sight; that she has to be helped and that her daughter has taken care of her for the past seven years. The court by its decree ordered that a bond be given in the sum of eighteen thousand dollars; that said Fred H. Farrand be appointed trustee and that the trustee be permitted to invest the funds as in his discretion he may determine. It is shown that the rate of taxation upon personal property in the City of Pittsfield, where the First National Bank is located, is seven per cent of value. The rate of taxation in Griggsville is not furnished. There is no criticism made as to the settlement of the estate by the executors or the investment of the funds in Liberty bonds. There is no criticism made against the First National Bank or its qualifications to act as trustee. Catherine Rush asks for the appointment of a trustee friendly to her and a creditor. There is criticism and opposition to the trustee named and reasons urged why he should not be appointed. Helen Rush occupies a confidential relationship to her mother, Catherine Rush, and from the testimony it may be inferred that the trustee named is as much her selection as the selection of her mother.

"The appointment of a fit and proper person to be a new trustee is a matter largely within the discretion of the court. It is not, however, an arbitrary discretion, but is subject to well known and clearly defined rules. The court will always give due weight to the wishes of those chiefly interested, but will not be controlled by such wishes against considerations of fitness. Where beneficiaries fail to agree, the court should appoint a disinterested person not nominated by any of the parties. As a general rule, interested persons should not be appointed." 39 Cyc. 283.

"The court will have regard to the wishes of the persons by whom the trust has been created, if expressed in the instrument

creating the trust or clearly to be collected from it. The court will not appoint a person to be a trustee with a view to the interest of some and in opposition to that of others of the cestuis que trustent; the court will have regard to the question whether the appointment of a proposed person will promote or impede the execution of the trust." 39 Cyc, 283 Note. And substantially the same rules are laid down in Yates v. Yates, 255 Ill. 72.

In this case, considering the age of the life tenant and her condition of health, the interest of the remaindermen is very much greater in quantity than the interest of the life tenant. It may be conceded, under all of the circumstances of this case, that it is of prime importance that Catherine Rush receive the income upon this fund and receive it promptly, but it cannot be conceded that that interest is to be accelerated by placing the fund in the hands of a creditor of Catherine Rush in preference to placing it with a disinterested trustee. If the wishes of the donor are to be consulted in any way, the petition and suggestions of the executors selected by her, and who have fully and completely executed their trust, is the best expression to be obtained of what the testatrix would do, if living. Under the testimony in this case the trustee appointed has such a relationship to the life tenant that he should not be appointed trustee of this fund, and it was error on the part of the court to appoint him. Error is assigned on the ground that the court did not decree that the funds remain and the inuring funds be invested in Liberty bonds at 4½ per cent interest per annum. These funds were invested by the executors named by the testatrix. They are tax exempt. There is no testimony in the case that the funds can be safely invested at a higher rate in any other security. They are convertible into cash at any time. Certainly, it would not be a wise use of discretion in this case, either on the part of the court or a trustee, to convert these funds and reinvest them in term mortgage loans when the occasion

to divide the fund may arise at any time. "An investment in Government or State bonds seems to be uniformly regarded in all jurisdictions as a particularly safe and proper one for a trustee to make." 29 Cyc. 395. Especially is this true where the bonds are convertible into cash at any time and the period for distribution is in the near future and may occur at any time. In the opinion of this court the decree of the lower court should have provided that the funds now invested in Liberty bonds should remain during the term, as invested, and that the further funds to be added should be, in a like manner, invested in Liberty bonds drawing interest at the rate of 4¼ per cent per annum, and the decree should have further provided that the interest thereon be paid to the said Catherine Rush as said interest accrues, annually.

The suggestion of the appointment of the First National Bank of Pittsfield, as trustee, was made by the executors in their bill of complaint. The answer of the appellants states that the First National Bank of Pittsfield is a legal depository for such funds, is a safe, suitable and proper person to act as trustee, that its solvency and business management is unquestioned and the appellants join in the executors' prayer that this Bank be appointed trustee. This is not a suggestion by the appellants but an acquiescence in the suggestion of the executors.

That part of the decree of the Circuit Court of Pike County appointing Fred H. Farrand trustee is reversed and the cause remanded with directions to appoint a disinterested trustee and to provide in the decree that the funds on hand remain invested in Liberty bonds, as now invested, and that the additional funds be invested in Liberty bonds, drawing interest at the rate of 4¼ per cent per annum, the interest and income upon said funds to be paid to the said Catherine Rush as said interest and income accrues, annually. Otherwise, the decree should be affirmed.

Reversed in part, affirmed in part.

Gen. No. 7907 OCTOBER TERM, 1925. Agenda No. 15

240 I.A. 682

W. W. Hiddle, Appellant, v. Charles Watson and Sam Springer, Appellees.	Appeal from the Circuit Court of Edgar County, Illinois.

Shurtleff, J.

Appellant brought his suit against appellees Watson and Springer in the Circuit Court of Edgar County to recover the sum of one thousand dollars, attorney fees and costs, claimed to have been paid by appellant to appellees upon the fraudulent sale of ten shares of the common stock in the Hoosier Rolling Mill Company, incorporated under the laws of Delaware and doing business at Terre Haute, Indiana, in violation of the Securities Act of the State of Illinois.

Appellant filed his special count and the common counts and tendered the stock back to appellees in court. Appellees presented the general issue. Appellee Watson resided in Edgar County and was served there. Appellee Springer was a resident of Cook County and service was had upon him in Cook County. The parties waived trial by jury and the cause was presented to the court and after hearing the proofs the court found a judgment for Appellee Watson on the merits of the issues, and Appellee Springer, having withdrawn his plea, a judgment was entered in favor of Appellee Springer on account of no service having been had upon him in said county and for want of jurisdiction, and appellant has brought the record to this court, by appeal , for review.

A number of questions pertaining to the law regulating the sale of securities are discussed by counsel in their respective briefs, but no propositions of law were submitted to the court, and from the record and the court's finding it is apparent that the case was decided upon the question of fact as to whether Appellee Watson was a solicitor, agent, broker, officer or director in the selling company, or in any manner aided or assisted in an unlawful sale of stock. Appellee Springer was a member of the brokerage firm of A. R. Morris and Company of Terre Haute, Indiana, and this firm had taken over a block of bonds and common stock of the Hoosier Rolling Mill Company for sale, of which the bonds were offered in Illinois, but Springer testified that none of the common stock was offered in Illinois and that all sales of stock, whenever made, were effected at Terre Haute, Indiana. The testimony showed that Appellee Springer, through a mutual friend, secured the aid of Appellee Watson to introduce him, Springer, to parties in Edgar County, in this State, and that Watson did ride with Springer and introduce him to appellant and some others. There is no testimony in the record that Appellee Watson was in any manner a solicitor, agent, broker, officer or director in either the Hoosier Rolling Mill Company or A. R. Morris and Company, or that he received any pay or reward for the service he rendered Springer, or that he received any commission or remuneration upon any sale made. Appellant testifies to various conversations with and statements made by the appellees in reference to said stock and bonds, but in each case appellant testifies "they said," without differentiating between the statements of the appellees separately. On the other hand, Appellee Watson testifies that he drove with Springer to appellant's farm, where appellant was "shucking" corn; that they went to the field and Watson introduced Springer to

whether Watson in any manner aided or assisted in said sale, assuming that it was a transaction governed by the laws of this State, upon which question we express no opinion, the trial court heard all of the witnesses and had them before him (except Appellee Springer) and was in a better position to determine the credibility to be accorded to the various witnesses than can be gleaned from the printed record, and we can not say, from reading the entire record in this case, that the judgment is manifestly against the weight of the evidence. The judgment of the Circuit Court of Edgar County, therefore, should be and is affirmed.

Affirmed.

Opinion filed February 22, 1926

Gen. No. 7913. 50906 Oct. 1925. Agenda No. 21.

240 I.A. 682

Edna Hutchison, Appellee,	)	Appeal from the
v.	)	Circuit Court of
Levi Murray, Appellant.	)	Christian County.

Shurtleff, J.

This is a suit over the sale of a garage, claimed to have been sold by appellee to appellant for the sum of one hundred dollars. In September, 1923, appellant, acting as agent for a Mrs. Tolliver, owner of a house and lot in Taylorville, entered into a verbal agreement with appellee to sell her the premises, and appellee paid one hundred dollars upon the purchase. Appellee asked permission to move into the place and to move a garage upon the premises before the contract of sale was signed by Mrs. Tolliver, who lived at Morrisonville. Appellant permitted appellee to move the garage upon the premises and it is shown by the testimony that the garage is sixteen feet square, constructed of one by ten ship lap with two by four posts and studding but has no floor, and, as appellee's testimony shows, sets on the ground and has no foundation; but appellant's witnesses testified that the corners set on concrete blocks and bricks set in the ground three inches, but the blocks and bricks were not laid in masonry.

Appellee lived upon the premises about six weeks and when appellant presented a contract, signed by Mrs. Tolliver, appellee concluded she could not go on with the contract and could not keep up her payments and, therefore, appellee did not sign the

contract and the sale of the premises to appellee was abandoned. Up to this time appellant had acted as agent for Mrs. Tolliver through a Mr. Diller, also living at Morrisonville, a relative of Mrs. Tolliver's. In January, 1924, the premises were conveyed by Mrs. Tolliver to Diller and in April, 1924, by Diller to appellant, and in December, 1924, appellant sold and conveyed the premises to one Conover.

There were proofs offered by appellee tending to show that after appellee abandoned her contract of purchase appellant gave her permission to move the garage off from the premises, and that appellee sold the garage to appellant for the sum of one hundred dollars, and that appellant promised to pay appellee that sum for the building, Appellee's proof further tends to show that after Diller purchased the premises he gave permission to appellee to move the garage from the lot. The garage remained on the lot while appellant was the owner of the premises and is still there.

The testimony is sharply conflicting. The jury found a verdict in favor of appellee in the sum of one hundred dollars which has been entered in judgment and appellant has appealed.

Appellant contends that, the garage being a part of the real estate and there being no contract in writing, the contract claimed to have been made by appellee for the sale of the garage is void. On the other hand, appellee contends that an article or structure moved upon or annexed to real estate, which may be removed without injury to the freehold, retains its character as personalty by agreement between the parties or consent of the land owner for its removal or sale separate from the realty, citing 26 Corpus Juris, 676; Hewitt v. General Electric Co. 164 Ill. 424; Sword v. Low, 122 Ill. 496; Ellison and Ellison v. Salem Coal Mining Co., 43 Ill. App. 120. The question of

intention on the part of the one making the annexation is of prime importance. In Sword v. Low, supra, the court held on page 496: "To determine the irremovable character of a fixture, three tests are, by the modern authorities, applied, viz: 'First, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which that part of the realty with which it is connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold.' Herrman on Chattel Mortgages, 6; Ewell on Fixtures, 21, 22; Tyler on Fixtures, 114; Washburn on Real Prop. 16.

"Mr. Ewell (page 22) says, that 'of these three tests the clear tendency of modern authority seems to give prominence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention.'

"Washburn (page 8) lays down the rule: 'It may be stated, in the first place, that whether a thing which may be a fixture becomes a part of the realty by annexing it, depends, as a general proposition, upon the intention with which it was done.'"

Appellee never had a contract for the purchase of the premises. The verbal contract made with her by appellant was void and appellee could repudiate it at any time and did abandon it. Appellee had permission to move the garage upon the premises. An intention to improve the premises by a permanent structure when appellee had no right, title, interest or claim in or to the premises cannot be imputed to appellee. The issue was presented to the jury as to whether the garage could be reasonably removed without material injury to the premises or the garage. The issue was further submitted to the jury as to whether appellee had permission from the owner to remove the

garage; and finally, the issue was fairly presented to the jury as to whether appellant purchased the garage and promised to pay her one hundred dollars for the same, and upon all of these issues the jury has found a verdict in favor of appellee. We have examined the rulings upon the admission and rejection of testimony and the giving and the refusal of instructions, and read the record and find therein no error that would warrant a reversal of the judgment. The judgment of the Circuit Court of Christian County is, therefore, affirmed.

Affirmed.

302/a

Gen. No. 7916 OCTOBER TERM, 1925. Agenda No. 24.

The People of the State of Illinois,
Defendant in Error,
v.
James Yankowski,
Plaintiff in Error.

240 I.A. 682

Error to the County Court of Christian County.

Shurtleff, J.

Plaintiff in error was indicted by the grand jury of Christian County for unlawfully having in his possession intoxicating liquors intended for use, by sale, for beverage purposes. The indictment was certified to the County Court for trial and the cause submitted to a jury. The jury found a verdict of guilty, upon which a judgment has been entered and the court sentenced plaintiff in error to pay a fine of four hundred dollars, and in addition to be committed to the county jail for 120 days and the record is brought to this court by writ of error for review.

The record shows that the sheriff, with his deputies, went to the home of plaintiff in error in the forenoon of May 6, 1924, with a search warrant, and found plaintiff in error's wife in the basement washing. Plaintiff in error was not at home upon their arrival but was working upon a building about a block and a half away, and returned to his home while the officers were there. The officers testify that while they were in the basement the wife broke a half gallon jar of "mule" which had been in a pail covered with clothes, and the officers obtained four bottles of "brew" which were taken to the sheriff's office,

Mrs. Yankowski testified that the bottle which broke contained ammonia which she had been using in washing the clothes, and that in picking it up the bottle caught in her clothes and fell to the floor and was broken. There is no testimony that any of the bottles containing "brew" or the broken bottle contained any intoxicating liquor, except the statement of the officers that the broken bottle was "mule". The officers again returned to the premises about one o'clock and made another search and found nothing and returned to the sheriff's office. About two hours later, upon being called up by a woman who lived in the neighborhood and requested to make another search, the officers returned to the premises and searched the garage and finally in the toilet or privy somewhere on the premises, by lifting up the floor, which apparently was arranged in the manner of a trap door, they found two five gallon kegs, each containing "mule" and two one-half gallon jars of prunes saturated with "mule" which were taken to the sheriff's office and the defendant was arrested.

Plaintiff in error was indicted in December, 1924, and a few days before the trial in February, 1925, a sample from one of the kegs was examined by a chemist and the testimony shows that this sample contained fifty-three per cent in volume of alcohol. The kegs and bottles were kept in the sheriff's private office from May, 1924, to February, 1925, under lock and key, but all of the deputy sheriffs carried keys to the room. Plaintiff in error testified that he had no intoxicating liquors upon his premises, and that he never heard of or knew anything about the kegs and jars found in the privy. Plaintiff in error had lived upon these premises about four years, but testified that he did not build the privy but that "a fellow from Kincaid named Polaski built it." There is no testimony in the record as to the size of plaintiff in error's lot, whether it is a city lot of the usual and ordinary

size or a field or farm, or as to the location of the out building on the lot. There is no testimony showing or tending to show that plaintiff in error ever used the out house or was ever in it, except the inference to be drawn from the casual statement of the witnesses that it was found "on the premises." There is no testimony that any of the liquors were intoxicating except the sample taken from one of the kegs and examined about nine months after the kegs were taken. The August, 1924, term of the court passed over without any indictment having been found against plaintiff in error, and however much the jury may have been impressed with the guilt of the plaintiff in error by seeing and hearing the witnesses, the record before this court is extremely meager, if indeed sufficient, of facts proven to warrant a judgment of conviction against plaintiff in error. However, the judgment in this case will have to be reversed for the error in giving People's instruction number one. In this instruction the court informed the jury that: "the possession of intoxicating liquor shall be prima facie evidence that such liquor is kept for the purpose of being bartered, furnished or otherwise disposed of in violation of law," and in the same instruction the court further said: "but the burden of proof shall be upon the possessor of any intoxicating liquor in any action concerning the same, to prove that such liquor was lawfully acquired, possessed and used." This instruction did not state the law; is in direct contradiction of other instructions given for plaintiff in error and has been held reversible error. (People v. Tate, 316 Ill. 59.)

Some other criticisms are made upon instructions, but upon another trial doubtless these will be corrected. The court sentenced plaintiff in error to pay a fine and to be committed to the county jail for a term. This was error. Plaintiff in error

cannot be both fined and committed to the county jail for unlawfully possessing intoxicating liquor. He may be fined or committed.

For the errors appearing in the record as pointed out, the judgment of the County Court of Christian County is reversed and the cause remanded.

Reversed and Remanded.

Gen. No. ~~7919~~ 7919 OCTOBER TERM, 1925 Agenda No. 27

240 I.A. 682

Ada Stoner Chapin, Defendant in Error, v. Banta Furniture Company, a Corporation, Plaintiff in Error.	Writ of Error to the Circuit Court of Macon County.

Shurtleff, J.

This is a suit in assumpsit by defendant in error against plaintiff in error, a corporation, to recover damages on a lease made between the parties extending from May 1, 1924, to the 30th day of April, 1933, at a monthly rental of three hundred dollars, payable on or before the first day of each month in advance.

The declaration charges that plaintiff in error entered into the possession of the premises and continued to occupy them from the first day of May, 1924, to the first day of September, 1924, and that on to wit, September 1, 1924, plaintiff in error vacated said premises and refused to pay the rent therefor and broke said lease and refused to comply with the same. It was provided in the lease that "if the rent above reserved, or any part thereof, shall be behind or unpaid, or if default shall be made in any of the covenants and agreements therein contained to be kept by the said party of the second part (plaintiff in error), it shall be lawful for the said party of the first part (defendant in error) at her election, to declare said term ended, and into the said premises, or any part thereof, to re-enter; and the said party of the second part, or any other person or persons occupying the same, to expel, remove and put out, using such force as may be necessary in so doing, and the said premises again repossess and enjoy, as in the first and former estate, and in such case, or in case of termination

of this lease in any way the parties of the second part covenant and agree to surrender," etc.

By another clause in the lease the second party waived its right to any notice from the party of the first part on her election to declare the lease at an end, under any of its provisions, of any demand for the payment of rent or the possession of the leased premises, and it was provided that the simple fact of the non-payment of rent reserved, or default in any of the convenants therein contained, should constitute a forcible detainer, as aforesaid.

There was a plea of non-assumpsit and two special please. Under the first plea plaintiff in error averred that the defendant in error should not recover a greater sum than three hundred dollars, because it says, "that after the execution of the lease defendant entered into possession and paid rent thereon until the first day of September, A.D. 1924, and being then unable to pay said rent, surrendered the possession of said premises to the plaintiff, and that thereafter, to wit, on the 5th day of September, the plaintiff served a notice in writing upon this defendant; that this defendant was in default in payment of rent and that unless the September month of installment of rent was paid by September 16th, 1924, that the plaintiff would declare the said lease broken and would proceed to re-enter the property in question and hold this defendant liable for damages, and that the plaintiff did thereafter, on the 7th day of October, A.D. 1924, institute this suit against the defendant to recover damages from the defendant on account of a breach of said lease, by reason whereof said lease became and was terminated by the acts of the plaintiff."

We shall speak of the defendant in error as plaintiff and the plaintiff in error as defendant

The second special plea set out substantially the same matter but incorporated a letter written by plaintiff to the defendant Banta Furniture Company under date of September 5, 1924, as follows:

"To Banta Furniture Company,
Decatur, Illinois.

Attention of Joseph H. Faith, Secretary.
Dear Sir: I beg to advise you that the keys to the premises belonging to me, held under lease by you, are still subject to your disposal, and your company is now in default in payment of rent, and unless this month's installment is paid by September 16, 1924, I will declare the contract broken and proceed to re-rent the property upon the best terms available, and hold your company and the guarantors upon the lease for any damages resulting from breach of your lease.

If you care to discuss matter of settlement and release upon this lease I would be willing to take the matter up with you at any time.

Very truly yours,
Ada Stoner Chapin,
Owner
By Frank A. Chapin,
Agent."

A demurrer was sustained to the two special pleas, a jury waived and the cause was submitted to the court. There was a finding for the plaintiff and judgment against defendant in the sum of $8684.04, and plaintiff in error has sued out a writ of error.

By the proofs it appears that the defendant abandoned the premises and abandoned the lease and sent the keys to the building to the plaintiff by registered mail, and that plaintiff receipted for the keys in the following language: "Received from the postmaster the registered or insured article the original number of which appears on the face of this card. Received and will hold for Banta Furniture Company." It further appears that all of the defendants were dismissed out of the case except the Banta Furniture Company, a corporation.

It further appears that plaintiff wrote the letter set out in defendant's second special plea to the defendant under date of September 5, 1924, and that the plaintiff attempted to re-rent said premises, but not finding a suitable tenant, brought this suit

on October 7, 1924. On March 30, 1925, when the judgment was entered in this cause, the premises were still vacant, although plaintiff had made a reasonable effort to procure a tenant.

Defendant contends that the court erred in sustaining the demurrer to the special pleas and that the abandonment of the premises and the lease by the defendant and the acceptance of the keys, and the intention to re-rent as set forth in plaintiff's letter of September 5, 1924, amounted to a surrender of the lease by plaintiff, and that she can recover only for rents due upon the surrender, and the defendant cites cases where it has been held that the abandonment of the premises and the lease by the tenant and the re-entry of the landlord constitute a surrender and rescission of the contract so that further recoveries under the lease cannot be had. The question raised is, whether the facts cited in this case constitute a surrender on the part of the plaintiff. Neither by the receipt for the keys nor by the letter of September 5, 1924, did the plaintiff consent to a recission of the lease nor a release of defendant's liability. The abandonment of the lease and the premises on the part of defendant was without any fault on the part of the plaintiff. In Marshall v. Grosse Clothing Co., 184 Ill. 424, the court held: "It is also claimed that after appellant abandoned the leased premises, acts of appellee in taking possession and renting a portion of the premises and in making alterations in the hallway and one of the rooms, constituted an eviction, and upon that ground appellee could not recover. There are two answers to this position. In the first place, the premises were abandoned by the appellant without the fault of appellee, and when such is the case the landlord may re-enter and re-rent the premises, crediting the former tenant with the proceeds, and his so taking possession does not relieve the tenant from liability for the

stipulated rent. (Humiston, Keeling & Co., v. Wheeler, 175 Ill. 514.)"

In Humiston, Keeling & Co. v. Wheeler, supra, it was held: "In order to constitute an eviction the tenant must abandon the premises on account of the act of the landlord, and if defendant had already abandoned them, the entry by plaintiff would not constitute an eviction. In case of an abandonment without fault of the landlord, or as the result of his acts, he may re-enter and again rent the premises and credit the lessee with the proceeds, and his so taking possession does not relieve from the payment of rent. (12th Am. & Eng. Ency. of Law, 751; Wood on Landlord & Tenant, Sec. 477.)"

In West Side Auction Co. v. Conn. Ins. Co., 186 Ill. 161, the court said: "It is said, however, that after the surrender of the keys the lessor put up signs to rent the property, and that it cleaned out the building. Upon the abandonment of the leased premises by the tenant it was the right and the duty of the landlord to take charge of the premises, preserve them from injury, and, if it could, re-rent them, thus reducing the damages for which the lessee was liable." And the court further said:

"We find no competent evidence in this record legally tending to prove that there was a mutual agreement between the parties for the canceling of the lease, and there is no pretense of a right on the part of the lessee to surrender the premises and cancel the lease without the consent of the lessor."

The rule stated is substantially the same rule laid down in Bannister v. Read et al, 6 Ill. 100; Springer v. Chicago Real Estate Loan Co., 202 Ill. 26; 35 Corp. Jur. 1092 and 1093, and many other cases and authorities. On the abandonment of the lease by the tenant it is the duty of the landlord to re-enter the premises and re-rent the same for the benefit of the tenant and in abatement of damages that might be caused by the tenant's failure to perform. (West Side Auction Co. v. Conn. Ins. Co.,

supra; Humiston, Keeling & Co. v. Wheeler, supra; Hinde et al, v. Madansky et al, 161 Ill. App. 216; Resser v. Corwin, 72 Ill. App. 625; Underhill v. Collins, (N.Y.) 30 N.E. 577; Third Am. Law Rep. 1082; Oldfield v. Angeles Brewing & M. Co. (Wash.) 35 L. R. A. (N.S.) 426, and 36 Corp. Jur. 340.) The question seems to be a question of the intent on the part of the lessor and under all the circumstances and facts proven in this case there is nothing that tends to show that plaintiff in accepting the keys or in attempting to re-rent the premises at any time consented to a surrender of the lease or a release of defendant's liability, and the court committed no error in sustaining the demurrer to defendant's special pleas.

The defendant contends that under the law of this state the plaintiff should not be permitted to recover damages on the entire lease or future profits. Both parties to this suit cite L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59. In this case on page 80 the court held: "It is well settled that where one party repudiates the contract and refuses longer to be bound by it, the injured party has an election to pursue either of three remedies: He may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover, under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized if he had not been prevented from performing. In the latter case the contract would be continued in force for that purpose."

The court further held, page 89: "Without further quotation from cases, it seems clear, both upon principle and by authority, that where one party to an executory contract refuses to

treat it as subsisting and binding upon him, or by his acts and conduct shows that he has renounced it and no longer considers himself bound by it, there is, in legal effect, a prevention of performance by the other party, and it can make no difference whether the contract has been partially performed or the time for performance has not yet arrived; nor is it important whether the renunciation be by declaration of the party that he will be no longer bound, or by acts and conduct which clearly evince that that determination has been reached and is being acted upon. It would seem clear, on principle, that a mere declaration of the party of an intention not to be bound, or acts and conduct in repudiation of the contract, will not, of themselves, amount to a breach, so as to create an effectual renunciation of the contract, for one party cannot, by any act or declaration, destroy the binding force and efficacy of the contract."

And the court further say, page 91: " The man who wrongfully renounces a contract into which he has deliberately entered, cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured, and it seems reasonable to allow an option to the injured party either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding, for the exercise of the option, which may be advantageous to the innocent party and cannot be prejudicial to the wrongdoer.' And it was then held that, after the defendant had signified his determination not to be bound by the contract, the plaintiff was entitled to bring his action immediately, and was not obliged to wait until after the day for the performance to begin had arrived."

There is an intimation in some of the authorities outside of this state that there is a divergence in authority when the rule is applied to the question of the abandonment of a lease, and that the rule in Illinois is that damages can not be

recovered upon the lease as an entirety. We find no such authority as held by the courts of our own State. There is a divergence of authority as to the implied duty of a lessor to put a lessee in possession of leased premises as commented upon in Sloan v. Hart, (N. C.) 21 L. R. A. (N. S.), 241, but we find no such authority in this State.

In Hull v. Kroft, 132 Ill. App. 509, it was held that when a contracting party gives notice of his intention not to comply with the obligations of his lease contract, the other contracting party may accept such notice as to anticipatory breach, and if he accepts it as such and considers the contract at an end, he may sue for damages without waiting for the completion and fulfillment of such contract by its terms.

This case involved a lease of lands where the tenant gave such notice prior to entering into possession.

In Hinde v. Madansky, 161 Ill. App. 220, the court, having before it the question of a lease of real estate, held: "Appellees correctly assert that the measure of damages for the abandonment of a lease by a tenant is the rent agreed to be paid less whatever the landlord could have made out of the premises by the use of due diligence after they came into his possession," citing Resser v. Corwin, supra.

In Favar v. Riverview Park, 144 Ill. App. 86, involving a lease of lands, the court held that: "The measure of damages for failure to give possession of leased premises is the difference between the actual rental value and the rent reserved to be paid by the lease. The same rule applies to a farm, a dwelling house, a hotel, or business premises. The rule is varied in case of an established business, in which case the measure of damages would be the difference between the rent and the value of the lessee's business, which would necessarily include an allowance

for profits. (Hexter v. Knox, 63 N. Y. 561; Paposky v. Monkwith, 68 Mo., 322.)"

In Oldfield v. Angeles Brewing & M. Co., supra, the court held: "It is well settled that for a breach by the lessor of the covenant for quit enjoyment, the lessee can recover as damages the difference between the value of his lease and the stipulated rent. (Buck v. Morrow, 2 Tex. Civ. App. 361, 21 S. W. 398); and no satisfactory reason can be given why the same rule should not be applied in favor of the lessor against the lessee." And the court further held: "Irrespective of whether the breach be by the lessor or lessee, --and in using the words 'lessor and lessee' we do so for convenience of reference, --it is difficult to see why this should not be the true measure of damages, since the damage to either party to the contract is the same, the loss of use and occupancy, which is the value feature of the contract to both parties; and what better way can there be to determine that loss than to take the difference between the amount fixed in the contract and the rental value of the premises for the given time? There is but one breach and there should be but one recovery for that breach." (Citing among other cases Favar v. Riverview Park, 144 Ill. App. 86.)

In Grommes et al v. St. Paul Trust Co. et al. 147 Ill. 643, a suit brought to recover damages for the abandonment of a lease, not, however, until the lease had expired, the court held: "It can make but little practical difference whether the sum agreed to be paid be called rent or damages. It may be regarded as damages for the purposes of this suit. (Hall v. Gould, 13 N.Y. 127; Underhill v. Collins, 132 id. 269.)

In numerous cases involving contracts as to other matters the court has held that the injured party to a contract,

not himself at fault, has the three options of procedure as provided in Lake Shore & Michigan Southern Ry. Co. v. Richards, supra; Shields v. Carson, 102 Ill. App. 44; McKenna v. McKenna, 118 Ill. App. 246; Stoneking v. Long, 142 Ill. App. 203; Hull v. Crawford, supra; Brown v. Hayes, (Wash.) 159 Pac. 89; Cal. Building Co. v. Drury (Wash.) 175 Pac. 303.

Some confusion has been caused as to the applicability of the rule to the facts in this case, by what the court said in Chicago Washed Coal Co. v. Whitsett, 278 Ill. 626. Appellant had purchased coal from appellee in certain quantities to be shipped monthly, and appellee made default in making shipments according to the terms of the contract, and appellant, by reason of appellee's default, refused to make payments for coal that had been already shipped, and the court held: "If appellant deemed the contract still valid and binding, it then had the right to treat the contract as terminated for all purposes and bring an action for its breach and for the damages which it had sustained by reason of non-performance or being prevented from performing the contract, or it had a right to return the contract as subsisting and to keep it alive for the benefit of both parties, keeping itself at all times ready, able and willing to perform its part of the contract and at the expiration of the term of the contract sue for its damages sustained by reason of the wrongful non-performance by appellees, but it could not do both," citing Lake Shore & Michigan Southern Ry. Co. v. Richards, supra. The court further held: "If it elected to keep the contract alive and in force for the purpose of recovering damages for future profits, it must do so for the benefit of both parties and must both allege and prove performance of the contract upon its part or

a legal excuse for its non-performance before there could be a recovery on the contract (citing cases). In the present instance appellant did neither, although it evidently tried to do both. It treated the contract as subsisting insofar as its right to demand delivery of coal thereunder was concerned, and broken insofar as appellee's right to demand payment of the coal previously delivered was concerned. This was fatal to appellant's right of action on the contract."

It is noticed that the court states only two options in appellant's favor instead of three as recited in L. S. & M. S. Ry. Co. v. Richards, supra. Under the facts in Chicago Washed Coal Co. v. Whitsett, supra, appellant did have two options only for the reason that appellant at the time being indebted to appellee for coal shipped could not rescind the contract and cause it to be cancelled entirely befause appellant was indebted to appellee for coal shipped, and therefore two options only remained to appellant. Appellant could not exercise each of the two options stated for the reason that appellant was indebted to appellee under the facts in that particular case and selection of both was ambiguous and contradictory.

Defendant in the case at bar contends on the holding in Chicago Washed Coal Co. v. Whitsett, supra, that plaintiff by her letter, having elected to keep the contract subsisting to re-rent the property upon the best terms available, and to hold defendant company and its guarantors upon the lease for any damages resulting from breach of the lease, could not thereafter elect to bring this suit to recover damages upon the lease in its entirety and for future losses upon the lease. It is to be noticed that the lease gives plaintiff the right to terminate it without giving any notice whatever to the defendant. Under the facts in this

case it can not be said that there is anything ambiguous or contradictory in the conduct of plaintiff in declaring the default and in entering into possession of the premises and attempting to re-rent the same, and thereafter when it was ascertained that defendant had made a complete abandonment of said lease, bringing this suit to recover the entire damages to the plaintiff and the future losses until the end of the term. In the opinion of this court plaintiff has a right under the law of this State to bring her suit to recover the entire damage that will result to her during the term for the defendant's abandonment of said lease.

The measure of damages as found by the court-- the same being the difference between the rental value as agreed upon less the rental value as found by the testimony in the case and compound interest deducted therefrom at the rate of five per cent -- was the correct rule of damages as applicable to this case. (Hinde v. Madansky, supra; Besser v. Corwin, supra; Favar v. Riverview Park, supra, and the other cases cited.)

Some complaint is made as to the nature of the proofs offered as to the value of the leasehold of said premises for the remainder of the term. Witnesses living in the vicinity of the property in question, having large experience in real estate affairs and knowing the value of leaseholds in the vicinity of the property in question, testified to their opinions as to the value of the leasehold in question. This testimony was competent and sufficient upon which the court was entitled to act. (Butler v. Merling, 15 Ill. 488; C. C. C. & St. L. Ry. Co. v. Wood, 189 Ill. 359.) We find no error in the competency or sufficiency of the testimony in question.

Defendant assigns error upon the amount of the finding and the computation made to arrive at the amount of the judgment. We have carefully gone over the computation in relation thereto and find no inaccuracies in arriving at the result found.

Finding no error in the record that warrants a reversal of the judgment of the Circuit Court of Macon County, that judgment is affirmed.

Affirmed.

Gen. No. 7924. OCTOBER TERM, 1925. Agenda No. 30.

People, Ex Rel. Maude Giles, Appellee,	)	240 I.A. 683
v.	)	Appeal from the Circuit Court of Shelby County
Warren Brookshire, Appellant.	)	

Shurtleff, J.

Appellant was found guilty of being the father of the child of Maude Giles, relatrix, in the County Court of Shelby County and brings the record to this Court for review.

The complaint was sworn to by relatrix alleging that she was an "unmarried woman, and on August 24, 1924, she was delivered of a male child, which by law is deemed a bastard, and that Warren Brookshire, of Macon County, is the father of the said child."

On the hearing before the county court and a jury, appellant was found to be the father of relatrix's child. The testimony of relatrix was that she and appellant and another man and woman took a ride around a four-mile drive in a two seated auto, at night, in the month of November, 1923; that she and appellant had sexual intercourse on this drive, and that as a result of this intercourse a child was born.

Mildred Giles testified that she saw these parties together on the night that relatrix testified this took place. Relatrix fixes the date positively as on the evening of November 10, 1923, and states that she never had intercourse with appellant at any other time. Relatrix never informed appellant of her condition until after the baby was born, though she admits seeing him and also admits taking a ride with him after she knew she was pregnant.

Relatrix in her testimony admitted intercourse with others in the possible period of conception. Appellant denied the act and the two parties whom relatrix testified were in the car on the evening in question, denied that any such act was committed, and further denied that the party of four were together in a machine or otherwise on the night in question. Appellant also offered as a witness a cousin, who testified he was with him during the entire evening of November 10, 1923, and that they-- the cousin and appellant--drove to Decatur; and also offered a witness, Durkin, who testified that he saw them in Decatur on the evening in question.

Where the evidence is sharply conflicting, as it is in this case, it is imperative that the instructions to the jury be accurate and free from error. (Zaniar v. Gas Co., 204 Ill. App. 291; Crisles v. Chicago R. R. Co., 204 Ill. App. 492; Carlin v. Chicago R. R. Co., 205 Ill. App. 303.) Where the evidence is conflicting an error in giving a bad instruction is ground for reversal, although the law is correctly stated in other instructions. (Herrig v. C. & A. R. R. Co., 299 Ill. 217.)

In appellee's second instruction on the question of an alibi the jury were instructed that "the exact time and place of sexual intercourse alleged by the prosecutrix is not material in the case; and if the jury believe the defendant had sexual intercourse with the prosecuting witness within the period of gestation," etc. In view of the testimony of relatrix in this case, the giving of People's second instruction was error. In Matteson v. The People, 122 Ill. App. 69, it was held: "In this state of the proof the court instructed the jury at the request of the prosecutor that the precise date of the conception of the child was not material. This was very misleading as applied to the proof in this particular case. If defendant was the father of the child, then the

precise date of the conception was immaterial; but in determining whether he was its father, it was very material whether it was conceived on the day when he bought the turkey and did the chores at the stable, for if it was not conceived on that day then he was not its father. This instruction was well calculated to lead the jury to disregard this most material feature of the defense."

The same rule is laid down in The People v. Welch, 143 Ill. App. 194. Appellant's instruction marked "H", which was refused stated the rule of law correctly as applied to the facts in this case and should have been given. People's instruction number five informed the jury: "Although you may believe from the evidence that the prosecutrix, witness, had sexual intercourse with another person about or near the time her bastard child might have been begotten, still such fact would not warrant the jury in finding the defendant not guilty, if you believe from a preponderance of all the evidence in the case that the defendant is the father of such bastard child." The giving of this instruction was error. In The People v. Lamberg, 160 Ill. App. 645, the court held: "It was, we think, reversible error to give this instruction. It cannot be construed, as contended by appellee, as submitting to the jury the question whether the relatrix had intercourse with Lindholm or Nyquist about the time in question, but by it the jury were told that if she did have intercourse with other men at or about the time in question, that notwithstanding such intercourse the jury might find that the defendant was the father of her child, Taking all of her testimony together, the testimony of relatrix that the defendant was the father of her child, was but the statement of an inference from the facts stated by her, that she had intercours with him and only with him about the time the child was begotten, and there is no evidence tending to prove any other fact as the basis of such inference. If she had intercourse with one other than the defendant about the time the child was begotten,

there was in her testimony no basis for the inference stated by her, or from which the jury might properly draw the inference that the defendant was the father of her child." But it is contended that this was not a mandatory instruction. In Mitchell v. Central Illinois Public Service Co., 231 Ill. App. 409, it is held: "It is true that the language of the direction concerning the verdict is not peremptory, but nevertheless the language is used to give the jury a direction as to the kind of verdict to render, and must therefore be considered as directing a verdict. It is not necessary that the language used to direct a verdict should be peremptory. Illinois Terra Cotta Lumber Co. v. Hanley, 214 Ill. 243; Illinois Cent. R. Co. v. Smith, 208 Ill. 608; Conley v. Wells Bros. Co.,155 Ill. App. 567."

Appellant assigns error upon statements made to the jury by counsel for the appellee in his closing argument, in stating: "That the question of the guilt of the defendant was one easily determined; that when the warrant had been sworn out against the defendant the defendant was going to the High School at Blue Mound; that the High School directors investigaged the charge of bastardy being tried in this case at the time the warrant was issued and found the defendant guilty and expelled him from school and refused to permit him to come back, and that the Board had no trouble in finding the defendant was guilty of the charge on trial."

There was no testimony in the case upon which to predicate such an argument. It was entirely outside of the record and highly prejudicial to appellant's cause and constituted reversible error.

Other assignments of error are made as to rulings upon evidence, one of which had reference to People's exhibits one and two and the People calling appellant to the stand in reference to these exhibits, which finally were not admitted. We do not find

these exhibits set out in the abstract and doubtless on another hearing the attitude of counsel for relatrix will be corrected.

For the errors pointed out the judgment of the County Court of Shelby County is reversed and the cause remanded.

Reversed and Remanded.

Gen. No. 7929 OCTOBER TERM, 1925 Agenda No. 33

240 I.A. 683

Mabel Schooley, Appellee, v. J. Keenan's Bank, a Corporation, Appellant.	)	Appeal from McLean County Circuit Court.

Shurtleff, J.

On April 9, 1923, appellee, in moving to the vicinity of LeRoy, transferred certain of her property affairs and bank account to appellant bank. She brought to the appellant bank a draft on Chicago for $4,361.48 and advised the president, Arthur J. Keenan, and the assistant cashier, Joseph Keenan, that she wanted to deposit the $361.48 on a checking account, $1,000 on a time certificate, and the balance, $3,000, she desired to have loaned out upon some safe security. To this the Keenans agreed. There was some discussion as to who would be a prospect for the loan and the name of Mr. Charles Null, who was one of the directors of the bank, was mentioned as a possible borrower, and she was told that Null would not give a mortgage but would only give his personal note if he borrowed the money as he was amply able to borrow money without mortgages for that amount. Appellee thereupon left the draft, received a credit in her checking account for the $361.48, a time certificate for the $1,000 and a receipt in the following words:

"LeRoy, Ill. April 29, 1923.

"Received of Mrs. Roy Schooley three thousand dollars (3000 and no/100 dollars) to loan on approved security.

(Signed) J. Keenan's Bank
LeRoy, Illinois.
J. Keenan, A-c."

This receipt was signed by the assistant cashier, Joe Keenan, and delivered to appellee. At the same time he made out

a certificate of deposit in favor of Mrs. Roy Schooley but payable to the order of J. Keenan's Bank to represent the three thousand dollars. This certificate he kept in his note file until the loan should be made. Appellee at the same time rented a box from the bank to keep her securities in. She deposited in this box the one thousand dollar certificate, together with other papers and mortgages which she had with her. She then stated that she was going to Chicago and would be gone for some time and told the assistant cashier when he had made the loan to put the note in her box and for that purpose left the key with him. Mr. Null, the prospective borrower, who had been in Florida, arrived in LeRoy about the 11th of April, 1923, and immediately thereafter he was asked by both Joseph Keenan and his father, Arthur J. Keenan, with reference to the loan and he stated that he did not want the money. Three or four days elapsed and they had been unable to find any other person to use the money, whereupon Arthur J. Keenan, who was the president of the bank, suggested to his son that if he thought it would be all right with Mrs. Schooley he would take the money and give his note for it, as he needed it. The assistant cashier said he thought that would be all right and made out a note, which his father signed, and passed to his father's credit the proceeds of the certificate which he held.

On appellant's part it is claimed that the elder Keenan told his son to immediately notify Mrs. Schooley, who was living at Ellsworth, that he had borrowed the money so that she would know about it, and it is claimed by the son that he did write a letter to appellee and properly stamped and mailed the same to her address at Ellsworth, and that the letter was never returned. This was about the 14th of April, 1923. Appellee lived some eight or nine miles from LeRoy. About five weeks later or the 22nd of May, appellee went to Chicago where she stayed until some time in August. Some time after appellee had gone to Chicago her brother-in law, Harry Schooley, came into the bank with two other notes

which she had to be placed in her box, and he went with Joseph Keenan, the assistant cashier of the bank, to the box, and it is claimed on the part of the bank that Harry Schooley was shown the note of Arthur J. Keenan's which was lying right on top of the papers in the box, and Joseph Keenan insists he placed his pencil on it.

There was testimony tending to show that appellee was at the bank after she returned in August and went to the box where this note was kept. There was nothing further transpired in connection with the matter until in January, 1924, at which time there was a meeting at the school house to organize a new bank to take over the assets of the Keenan Bank, which had been compelled to liquidate. At that time appellee and her brother-in-law, Harry Schooley, talked with Arthur J. Keenan and the witness B. F. Baker, and this note was mentioned, Keenan saying to her that he was sorry the way things had turned out and that they could not loan the money to Charles Null, and said that it would have been better for both of them, but at the time he borrowed the money he thought his note was as good as Null's, to which it is claimed the appellee replied that she thought so too. Prior to this time Arthur J. Keenan had become a bankrupt and his estate was being settled in a bankruptcy court. He was insolvent. Harry Schooley denies seeing the note in appellee's box in the summer of 1924. He states that he saw some note in the box but assumed it was Null's note and nothing was said about the matter and it was not so that he could read it or see any of the writing on the note. Appellee denies that she was in the bank at any time. Appellee testified that she never knew anything about the loan to Keenan until the occasion of the meeting at the school house in the winter of 1924; that the assistant cashier had informed her that the loan had been made to Null, and in some things appellee was corroborated by her brother-in-law, Harry Schooley.

There were some conferences about the estate of Arthur J.

Keenan after the meeting in the winter time, and appellee signed a composition agreement among the creditors of Keenan with the understanding, however, that she could withdraw her name at any time before all of the creditors had signed. Appellant offered proof that she signed two of such agreements, neither of which, however, ever were completed or became effective. There was a sharp conflict in the testimony as to appellee's knowledge that the loan was made to Keenan, but it was not claimed that any borrower's name, except Hull's, was mentioned in April, 1923.

Appellee brought suit in assumpsit upon three special counts, one of which was based upon the receipt of the bank and an additional count upon the common counts. Appellant submitted five pleas; the first, non assumpsit, the fourth that the defendant did loan said money so deposited with it, as in said declaration mentioned, upon approved security, as then and there agreed upon; and an issue of fact was made upon the first and fourth pleas. Appellant's third plea raised the issue of ultra vires on the part of the bank to enter into any such contract or to act as agent for appellee in such a transaction, to which plea a demurrer was sustained, and appellant assigns error upon the ruling sustaining the demurrer. There was a trial by jury and a verdict and judgment in favor of appellee for $3150, and appellant has brought the record to this court, by appeal, for review.

Appellant assigns error on the sustaining of the demurrer to its plea of ultra vires. Appellee objects to the consideration of this assignment as no question was raised as to the sufficiency of the declaration and there was no motion in arrest of judgment. However, there was a motion to direct a verdict and appellant submitted the proper instructions, which were refused. Appellant contends that the bank, having no power to act as agent in making loans for another, and the deposit being for a special purpose, is not liable to appellee, but that the officers who did receive

appellee's funds and performed the transaction for appellee, must be regarded as her agents and must assume the liability. The decisions of the courts do not support appellant's contention. (First Nat. Bank of Monmouth v. Brooks, 22 Ill. App. 238; Squires v. First Nat. Bank, 59 Ill. App. 134; Owens et al v. Stapp, Receiver, 32 Ill. App. 653; Doerstler v. First Nat. Bank, 161 Pac. 387; L'Herbette v. Pittsfield Nat. Bank, 38 N. E. 368, and cases there cited.)

In Owens v. Stapp, supra, the court held: "It is urged here, as a complete answer to all the facts and circumstances (to some of which we have above alluded) that such transactions were not within the powers of the bank, under its charter. This, if conceded to be strictly true in a technical sense, does not bar the relief sought; for the transactions in the case at bar, as shown by the record, were not criminal nor against public policy, and when once executed, in whole or in part, as in this case, the bank cannot repudiate the transaction, hold and enjoy the benefits, and escape the liabilities."

And on page 660 said: "Where a corporation is acting within the scope and purposes of its organization, all parol contracts made by its authorized agents are held as express promises of such corporation, and the benefits arising therefrom or conferred thereby raise implied promises and legal obligations, for the enforcement of which an action lies against such corporation. (Bank of Columbia v. Patterson, 7 Cranch, (U. S.) 299; 5 Wheat., supra, 326; 8 Wheat., supra, 338; Bk. of Metropolis v. Gultshlick, 14 Pet. (U.S.) 19; Gottpeid v. Miller, 104 U. S. 521)."

First Nat. Bank of Monmouth v. Brooks, supra, is a complete analysis of the reasoning upon the subject and compilation of the authorities, with which we are in accord, at least, to the extent of holding that the funds, having been received and accepted by the bank--whether or not the agreement exceeds the technical powers of the bank--appellee is entitled to have the agreement

carried out or a return of the funds; and the cases seem to be in accord upon that question.

Appellant further assigns error that the verdict is against the manifest weight of the testimony on the subject of ratification of the loan made. Appellant states the rule correctly that it is the law that the plaintiff, if she sought to repudiate the transaction, should have tendered back the Keenan note as soon as she had knowledge of the circumstances, citing Hilton v. Meier, 257 Ill. 500. The court instructed the jury that "it became the duty of the plaintiff, upon being put in possession of the note of Keenan and advised that the loan had been made in her behalf, to act promptly if she desired to repudiate the transaction." And again the jury were instructed "that if the plaintiff obtained full knowledge of the facts and thereafter gave her consent and approval to said loan, or dealt with the note evidencing said loan as her own property, then such conduct upon the part of plaintiff would amount to a ratification," etc.

The instructions were as favorable to appellant as it could request and more favorable than the law warrants. Appellee testified, and was corroborated, that she never knew that the loan had been made to Keenan until the meeting at the school house to form a new bank; that prior to that time statements had been made to her by Joseph Keenan from which she inferred, and had the right to infer, that Hull had her money and that it was all right; that appellee knew little or nothing about the affairs of Arthur J. Keenan until his matters became involved in bankruptcy, and then she was urged by Keenan's attorney to sign the creditor's agreement. There is further testimony tending to show that in February, 1924, while appellee was discussing the matter with Keenan's attorney, he then first ascertained that appellee had the receipt from the bank and that he stated to appellee that he could not advise her and that she should consult some other attorney.

Apparently, appellee had had no counsel upon the matter up to that time.

The question of ratification is a question of fact for the jury. (Pehl v. Davenport Co., 46 App. 513; Deland v. Dixon Nat. Bank, 111 Ill. 323.) And the question whether the delay for the length of time mentioned was a reasonable one or not, under all the circumstances of the case, was a question of fact for the jury and not a question of law. (Jones v. Consolidated P. & F. Co., 100 Ill. App. 92.)

In order to bind a party as principal by ratification of the act of another, he must have been at the time fully and fairly informed of all the material facts and circumstances. (Caldwell v. Meek, 17 Ill. 220; Matthews v. Hamilton, 23 Ill. 416; Reynolds v. Ferree, 86 Ill. 570; International Bank v. Ferris, 118 Ill. 465.)

Inasmuch as Arthur J. Keenan's affairs were in bankruptcy and he was insolvent at and before the time appellee had any knowledge (from her own testimony) that she held his note, it is not surprising (if the jury gave any credence to appellee's testimony) that they resolved the question of ratification in appellee's favor. There was sufficient testimony to support the verdict on that question.

Appellant assigns error in that appellee was permitted on rebuttal to show the financial condition of Arthur J. Keenan in April, 1923, and that he was indebted in the sum of several hundred thousand dollars and was substantially insolvent. Keenan testified on rebuttal for appellee that in April, 1923, he was owing appellant bank the sum of fifteen thousand dollars and had made a statement of his affairs to the bank when making said loans. The competency of this testimony is based upon the testimony of Joseph Keenan, assistant cashier of appellant bank, offered by appellant to support its fourth plea. Keenan testified that he made the loan of three thousand dollars to his father, Arthur J. Keenan; that his father gave no security other than his personal note; that

the note conformed to what he considered "approved security"—an approved note, "that is what it means. We got as good as any other personal note, which we considered a good note; we asked for no other security."

Appellant made the issue under the fourth plea and submitted at least prima facie proof of its truth. Appellee certainly had the right to rebut this proof and offer proof tending to show that the note of Arthur J. Keenan was not approved security. Approved security is defined to mean: "But a sale made on terms of acceptance of 'approved' security or surety, without more, is properly held to mean good and solvent security, which ought to be approved, which the vendor can show to be good and meriting approval. One of the definitions of 'approve' given by Mr. Webster is 'to make or show to be worthy of approbation or acceptance.'" Andis v. Personett (Ind. Sup.), 9 N. E. 101. The verdict of the jury is fully supported by the testimony upon this issue.

Objection is made that in one of appellee's instructions given by the court, the jury were informed that the bank is chargeable with all the knowledge possessed by the president of said bank, as applied to the facts in this case. Technically, this instruction as to the matter stated was not correct and did not state the law. (Cowan v. Curran, 216 Ill. 617.) The question at issue was, whether the note of Arthur J. Keenan for three thousand dollars in April, 1923, was an approved security. Upon this question the bank, at and prior to April, 1923, did have the statements of its president as to his financial affairs, which statements, for the purposes of this suit, must be presumed to have been made correctly, and having such statements, the bank(appellant) had the knowledge of all the facts testified to by the witnesses in this case. If appellant, in fact, had such knowledge from other sources, the technical error in the instruction in no manner prejudiced appellant's case.

Appellant, without making a motion in arrest of judgment, insists that appellee is not entitled to recover in this case, inasmuch as the declaration does not charge negligence to the bank. The foundation of this case is not negligence on the part of the bank. In the opinion of this court the cause of action in this case is rather tersely stated in L'Herbette v. Pittsfield Nat. Bank, supra, "The bank is bound because its cashier, assuming to act in its behalf, received the plaintiff's money as money deposited in the bank, and the fact of his making invalid agreements, if his agreements were invalid, that the bank should at some time in the future invest the money for the plaintiff, and meanwhile should allow him interest upon it, does not have the effect to exonerate the bank from its liability to refund the money, without interest, to the plaintiff on demand, no investment thereof having been made by it. (White v. Bank, 22 Pick. 181; Atlas Bank v. Nahant Bank, 3 Metc. (Mass.) 581; Dill v. Wareham, 7 Metc. (Mass.) 438; Morville v. Society, 123 Mass. 129; Davis v. Railroad, 131 Mass. 258; Bank v. Townsend, 139 U. S. 67 74 11 Sup. Ct. 496; Spring Co. v. Knowlton, 103 U. S. 341; Bank v. Gove, 57 N. Y. 597; Ziegler v. Bank, 93 Pa. St. 393; Bank v. Brooks, 3 Browne, Bank Cas. 387; Thompson v. Bell, 10 Exch.10)."

There may be some question in this case as to appellee's right to recover interest upon the fund; but the question was not raised upon the trial and no assignment of error is made covering that point and no objection to the instruction is argued, so the question is not before this court for consideration.

Finding no error in the record warranting a reversal of the judgment of the Circuit Court of McLean County, the judgment is affirmed.

Affirmed.

TERM NO.22. AGENDA NO.31.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT.

MARCH TERM, A. D. 1925.

Filed Aug 5th 1925

THERESA VERLIE, Appellee.	)	APPEAL FROM ST.CLAIR COUNTY
vs.	)	CIRCUIT COURT.
ANTON JUCHNIEWICZ, et.al. Appellants.	)	

Contract Lien

OPINION BY HIGBEE, P.J.

Appellee, Theresa Verlie, filed her bill to the January Term, 1923 of the Circuit Court of St.Clair County for the foreclosure of a real estate mortgage covering the premises now owned and in the occupancy of Anton Juchniewicz, making William Shields, Eugenia Shields, George Kaufer and Anton Juchniewicz parties defendant. On February 15, 1916, as it appeared from the proof, William Shields and Eugenia Shields executed a mortgage which was recorded March 4, 1916, on the premises involved to Henry T.Renshaw, trustee, to secure the payment of a promissory note of that date, in the sum of $800.00. On August 1, 1919 William Shields and Eugenia Shields conveyed these premises by warranty deed to George B.Kaufer. There were no exceptions in this deed and it does not recite that it was made subject to the above mortgage. On October 9, 1919, George B.Kaufer and his wife, conveyed the premises by warranty deed to Anton Juchniewicz

Bergeley & [illegible] for Appellant
Turner, Holder & Lillington for Appellee
Hon. [illegible] Circuit Judge
Petition for Writ of Certiorari
Petition Denied Nov. 6th 1925.

appellant without any conditions or exceptions and without stating that it was subject to the mortgage. The note in question was endorsed in blank by Henry T.Renshaw,trustee. Appellee testified that she purchased the note from Renshaw in March or April 1916,and that the same has continually since that time been in her actual possession. There is no evidence that appellee ever recorded any written assignment of the mortgage or that she in any way ever notified the makers of the note or the subsequent purchasers of the property that she was the owner of the note and mortgage. George B.Kaufer testified that when he purchased the property in August,1919,for which he paid $2,000.00,he paid Renshaw the $800.00 mortgage and did not know that appellee was the holder of the mortgage,and that he was to get"a free and clear title"to the property. Appellant, Anton Juchinewicz,paid $2,500.00 for the property in cash,and also testified that he was to get a free and clear title. On December 2,1919,Henry T.Renshaw,trustee executed a release of the mortgage in question and the same was recorded the following day. The case was referred to the Master in Chancery,and later to a special Master who recommended a decree foreclosing the mortgage and the court entered a decree in accordance therewith.

It is contended by appellants that as they had no notice,either constructive or actual,that appellee was the owner of the mortgage at the time Kaufer paid the same to Renshaw,the original payee,such payment is a bar to the foreclosure of the mortgage. As the evidence shows conclusively that appellee never filed any written assignment of the mortgage due her,it follows that none of the appellants had any constructive notice that she was the owner thereof at the time the payment was made to Renshaw. Neither is there any evidence tending to show that appellants or any of them had any actual notice that she was

such owner. It is the well settled law of this state that while the assignment of a promissory note secured by a real estate mortgage carries with it the mortgage,which is but an incident to the principal debt,yet this is true only in equity. If a mortgage is so assigned and the mortgagor without actual or constructive notice pays the original payee who has thus parted with the note,such payments will discharge the lien of the mortgage pro tanto and in a suit to foreclose the mortgage such payments may be set up in bar of a decree for foreclosure. Among the decrees in this state so holding are Towner vs McClelland,110 Ill. 542;McAuliffe vs Reuter,166 id.491;Napieralski vs Simon 198 id. 384;Schultz vs Sroelowitz 191 id 249; Gemkow vs Link 225 id 21;Pittsburg Plate Glass Co. vs Krauss 291 id 84 and Hess vs Lobstein 108 Ill App. 217.,based upon the doctrine that a mortgage not being assignable at law and the assignee having to rely on a court of chancery to enforce his rights,that court will not enforce it in his favor,if it ought not to be enforced in the hands of the original mortgagee, and the assignee will not be protected from payments to the mortgagor by the mortgagee in good faith where the mortgagor has received no notice either constructive or actual of the assignment. In this case there can be no doubt that if this action had been brought by Renshaw,the original payee,the payment to him of this mortgage out of the money paid for the premises by Kaufer would bar him from any decree of foreclosure. This being true and the evidence failing to show that appellee ever recorded any assignment of the mortgage or gave appellants any notice of the assignment to her,she is not entitled to a decree of foreclosure in this case. Had Kaufer or Juchniewicz purchased the property subject to this mortgage indebtedness and assumed and agreed to pay the same then appellee would be entitled to a decree not withstanding she had failed to record

any assignment of the mortgage to her and had failed to give appellants any notice of such assignment(Schulz vs Sorelowitz,supra,Gemkow vs Link,spura.). The principal of law invoked by appellants in this case would not apply if this action were a suit at law upon the note itself but since this is an action in equity for the foreclosure of a mortgage,we must hold in accordance with the rule of law laid down by the above authorities that the payment of the mortgage indebtedness to Renshaw,trustee,the original payee,is a bar to a decree in favor of appellee in this case. This holding is also in accordance with the opinion of this court in the case of Doster vs Oulney,233 Ill.App.468,in which case a petition for a writ of certiorari has been denied by the Supreme Court.

Under the view we have taken of this case as above expressed,it isnot necessary for us to pass upon other errors assigned by appellants.

The decree will be reversed and the cause remanded with directions to the court below to dismiss appellee's bill for want of equity.

DECREE REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

not to be reported.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT.

filed Nov. 12th 1925

OCTOBER TERM A. D. 1925.

240 I.A. 683

TERM NO.13. AGENDA NO.4.

240 I.A. 683

THE PEOPLE OF THE STATE OF ILLINOIS. Defendants in Error.	)	ERROR TO THE COUNTY COURT OF SALINE COUNTY.
vs	)	
W.C.RETTICH, Plaintiff in Error.	)	

Per Curiam:- Plaintiff in Error entered a plea of guilty to the information which charged that on November 14,1923,he "did then and there unlawfully transport intoxicating liquor on the public highways in violation of the Illinois Prohibition Act, contrary to the statute," etc.,and he was sentenced to the Illinois State Farm for six months and fined $200.00.

He contends that the information does not charge the commission of a criminal offense and that it is insufficient to support the judgment. The contention must be sustained under People vs Wallace, 316 Ill. 120, People vs Martin, 314 Ill. 110, and People vs Barnes, 314 Ill. 140. While there was no charge of "unlawful transporation"in either of these cases,yet they are clearly applicable because under section 7 of the Prohibition Act the transportation of intoxicating liquor is not unlawful if the party has a permit from the Attorney General. The sufficiency of the information may be raised by motion in arrest of judgment or by Writ of Error.

#1.

see Brief for Attorneys

Klanauski vs People, 218 Ill. 418; People vs Wallace, 316 Ill. 120 - 122. Under the authorities above cited it was necessary to aver that plaintiff in error transported intoxicating liquor without having such a permit to do so.

The judgment of the County Court is reversed.

Reversed.

not to be reported.

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